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UNIDIMENSIONAL FEDERALISM: POWER AND PERSPECTIVE IN COMMERCE CLAUSE ADJUDICATION

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Since 1995 the U.S. Supreme Court has applied a new form of rigorous judicial scrutiny in assessing the constitutional limits of the Commerce Clause, a provision that long has functioned as the central authorization of congressional power. As critics on and off the bench have noted, the Court has advanced its conception of federalism by requiring that the regulated activity itself be economic or commercial in nature. A crucial aspect of the Court's approach that has received less attention is the initial step of selecting the relevant activity for constitutional analysis. One may view legislation from a variety of different perspectives, and the choice of vantage points can be critical in determining the requisite commercial nexus. In the wake of the New Deal, the Court upheld legislation if it had a commercial connection when viewed from any perspective. Professors Schapiro and Buzbee argue that the Court recently broke from a half century of settled jurisprudence in insisting on selecting a single perspective as determinative. This approach, which they term "unidimensional," relocates substantial discretion from Congress to the judiciary. Drawing on the insights of recent scholarship on statutory interpretation, Professors Schapiro and Buzbee illuminate the flaws in the Court's unidimensional approach. In place of this unidimensional approach, the authors offer a "legislativist" framework, under which the text of the legislation guides the judicial identification of the relevant activities for purposes of Commerce Clause scrutiny.

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INTRODUCTION

Law, like any complex process, can be viewed from a multiplicity of perspectives. In assessing legislation, one could focus on the issues triggering political attention, the targets of the law, the intended beneficiaries, the motives of the legislators, or the broader effects of the legislation. In this regard, one can understand legal analysis as refracting a legal text through a prism and assessing its various components. Crucial to legal interpretation is determining which perspectives matter and who gets to choose. Judicial review will produce markedly different outcomes if a court insists on designating a preferred vantage point, rather than deferring to the approaches of other constitutional actors. Much may turn on the selection of perspectives; great power lies in controlling that choice.

Over the past decade, the U.S. Supreme Court has adopted a narrow conception of legal analysis in several areas. This Article identifies that judicial approach, which we term "unidimensional," and demonstrates its centrality to the constitutional jurisprudence of the Rehnquist Court, especially in the arena of federalism.[1] We develop this argument through an examination of recent Commerce Clause cases, in which the Court has deployed a unidimensional approach to limit the exercise of congressional power. In breaking with a uniform line of post-New Deal decisions and finding that Congress exceeded its Commerce Clause authority, both *United States v. Lopez*[2] and *United States v. Morrison*[3] placed great weight on whether the subject of regulation was economic or noneconomic.[4] The potentially revolutionary aspect of these cases, however, does not stem from the Court's concern for locating a commercial or economic nexus.[5] Rather, it is the Court's constrictive understanding of the perspective for assessing the Commerce Clause connection that represents a new constraint on congressional authority. In focusing narrowly on one target of the

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1 This Article builds on our prior works that draw on the insights of administrative law and statutory interpretation to illuminate the Supreme Court's recent federalism and public law jurisprudence, *see* William W. Buzbee, *The One-Congress Fiction in Statutory Interpretation*, 149 U. PA. L. REV. 171 (2000) [hereinafter Buzbee, *One-Congress Fiction*]; William W. Buzbee, *Standing and the Statutory Universe*, 11 DUKE ENVTL. L. & POL'Y F. 247 (2001) [hereinafter Buzbee, *Standing*]; William W. Buzbee & Robert A. Schapiro, *Legislative Record Review*, 54 STAN. L. REV. 87 (2001), as well as on our works that explore the appropriate allocation of interpretive authority in the American constitutional system, *see* Robert A. Schapiro, *Identity and Interpretation in State Constitutional Law*, 84 VA. L. REV. 389 (1998); Robert A. Schapiro, *Judicial Deference and Interpretive Coordinacy in State and Federal Constitutional Law*, 85 CORNELL L. REV. 656 (2000); Robert A. Schapiro, *Polyphonic Federalism: State Constitutions in the Federal Courts*, 87 CAL. L. REV. 1409 (1999).

2 514 U.S. 549 (1995).

3 529 U.S. 598 (2000).

4 *See, e.g., id.* at 613 ("[T]hus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature." (citing *Lopez*, 514 U.S. at 559–60)).

5 Chief Justice Rehnquist, the author of the majority opinions in *Morrison* and *Lopez*, generally refers to "economic," rather than commercial activity. *See Morrison*, 529 U.S. at 613; *Lopez*, 514 U.S. at 560. Other Justices appear to use the terms "economic" and "commercial" without distinction. *See, e.g., Lopez*, 529 U.S. at 627–28 (Breyer, J., dissenting). Some commentators have suggested that "economic activity" is generally the broader term, but that the Court has expanded its understanding of "commerce" to the extent that the two terms have become effectively synonymous in the Court's discourse. *See* Jesse H. Choper & John C. Yoo, *The Scope of the Commerce Clause After* Morrison, 25 OKLA. CITY U. L. REV. 843, 865 (2000) (asserting that the Court has to a great degree equated "commercial" with "economic"); Ernest A. Young, *Dual Federalism, Concurrent Jurisdiction, and the Foreign Affairs Exception*, 69 GEO. WASH. L. REV. 139, 159–60 (2001) (asserting that the Court has defined "commercial activity" broadly to reach "economic activity"); *see also* Grant S. Nelson & Robert J. Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control over Social Issues*, 85 IOWA L. REV. 1, 109–10 (1999) (distinguishing between the broader term "economic" and the narrower term "commercial"). This Article uses the two terms synonymously, except as expressly indicated.

legislation—for example, on the gun-toting student and the alleged rapist—rather than on the intended beneficiaries, the ills triggering legislative action, or the ripple effects of regulatory intervention, *Lopez* and *Morrison* revived a skeptical form of rigorous judicial scrutiny. The Court's groundbreaking and incompletely rationalized, methodological shift has led to lower court confusion regarding how to assess Commerce Clause challenges to federal regulatory power.[6]

Commentators on and off the bench have criticized the Court's fixation on the commercial/noncommercial distinction.[7] Without an appreciation of the perspective issue, however, these criticisms lack an essential component. It is difficult to deny the relevance of commerce to the interpretation of a clause conferring authority to "regulate Commerce."[8] Of course, assessing the nexus to commerce remains an important part of any construction of the Commerce Clause. The problem lies not in the search for a commercial nexus, but in the restricted field in which the Court is willing to search. Whether legislation implicates commerce depends on what activities are recognized and on the perspective from which an activity is viewed.[9] The Court's recent decisions suggest a manipulation of the perspective selection and a preference for a vantage point that diminishes the commercial connection.

Another recent case highlights the importance of the perspective issue. In *Solid Waste Agency v. United States Army Corps of Engineers (SWANCC)*,[10] the Supreme Court addressed whether a federal regulation controlling the development of wetlands exceeded the bounds of the Commerce Clause. The Court ducked resolution of the constitutional question, but characterized the federal government as acting at the outer limits of its power.[11] The decision in *SWANCC* emphasized the importance of identifying the proper focus for applying the commercial/noncommercial test, and strongly suggested that only a single

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6 *See infra* Part II.F.

7 *See, e.g.*, *Morrison*, 529 U.S. at 640, 642–45 (Souter, J., dissenting); *id.* at 656–57 (Breyer, J., dissenting); *Lopez*, 514 U.S. at 608 (Souter, J., dissenting); *id.* at 627–29 (Breyer, J., dissenting); Christy H. Dral & Jerry J. Phillips, *Commerce by Another Name: The Impact of* United States v. Lopez *and* United States v. Morrison, 68 TENN. L. REV. 605, 618–25 (2001); Peter M. Shane, *Federalism's "Old Deal": What's Right and Wrong with Conservative Judicial Activism*, 45 VILL. L. REV. 201, 220–22 (2000); Donald H. Zeigler, *The New Activist Court*, 45 AM. U. L. REV. 1367, 1395–97 (1996).

8 U.S. CONST. art. I, § 8, cl. 3.

9 Some scholars have noted the importance of characterizing the relevant activity for purposes of Commerce Clause analysis. *See* Lawrence Lessig, *Translating Federalism:* United States v. Lopez, 1995 SUP. CT. REV. 125, 204–06; John Copeland Nagle, *The Commerce Clause Meets the Delhi Sands Flower-Loving Fly*, 97 MICH. L. REV. 174, 209 (1998). This Article attempts to provide a systematic account of the problem of determining the pertinent perspective.

10 531 U.S. 159 (2001).

11 *See id.* at 172–74.

perspective could be valid, but failed to clarify the proper analysis for ascertaining that preferred viewpoint.[12] Similar issues have arisen in other statutory contexts. For example, the federal Freedom of Access to Clinic Entrances Act of 1994 prohibits certain kinds of demonstrations at abortion clinics.[13] In evaluating the constitutionality of the Act, must a court choose a single activity for purposes of Commerce Clause analysis, and if so, is the pertinent activity protesting, performing medical procedures, broader economic effects of blockades, or some other array of implicated activities?[14] The constitutionality of this and other statutes may well turn on the perspective from which the decision maker views the commerce question.

The Court's singular focus threatens to impose a new judicial limitation on the scope of federal legislative power. The adoption of multidimensionality represented a key component of the New Deal Court's validation of the modern regulatory state. In landmark cases, such as *NLRB v. Jones & Laughlin Steel Corp.*,[15] the Court inaugurated a new approach that accepted a variety of perspectives as sufficient to validate statutes.[16] The commercial effects of legislation, the commercial implications of an underlying problem, as well as the commercial nature of the regulatory target, all served as legitimate bases for the exercise of federal power. This approach allowed Congress, rather than the Court, to select the relevant commercial perspective. The Court accepted any reasonable choice, and this broader framework gave wide authority to Congress to craft national policy. The Rehnquist Court's unidimensional approach constitutes an implicit rejection of that deference.[17]

This singular focus links the Rehnquist's Court's Commerce Clause cases with other aspects of its jurisprudence. With regard to standing and the review of agency inaction, for example, the Court has insisted on privileging the perspective of the apparent target of

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12 *See id.* at 173 ("[W]e would have to evaluate the precise object or activity that, in the aggregate, substantially affects interstate commerce. This is not clear . . . .").

13 18 U.S.C. § 248 (2000).

14 *Compare, e.g.*, United States v. Gregg, 226 F.3d 253, 262–63 (3d Cir. 2000) (upholding the Act based on the effects of protesting and on the economic activity of providing health services at clinics) *with, e.g., id.* at 269–70 (Weis, J., dissenting) (asserting that the statute exceeded congressional authority because of the noncommercial nature of protesting activity).

15 301 U.S. 1 (1937).

16 *See, e.g., id.* at 36–37.

17 This unidimensionalism is just one example of what some critics have labeled a new manifestation of "judicial supremacy." *See* Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 240, 243–44 (2002) (arguing that the Rehnquist Court's disregard for the strictures of the political question doctrine reflects its broader conception of the judicial branch as the sole legitimate source of federal authority to interpret substantive constitutional provisions).

regulation.[18] Under this emerging doctrine, a party can contest the enforcement of a legal rule that constrains its conduct. In contrast, the beneficiaries of actual or potential regulatory activity have much less ability to challenge governmental conduct. This favoring of putative targets over beneficiaries tilts the field against active regulatory policies.[19] In this area, as in its Commerce Clause jurisprudence, the Court's privileging of a single perspective impedes the exercise of federal regulatory authority.

This Article argues that the Court's search for a single, privileged perspective is fundamentally misguided. The Rehnquist Court's unidimensional approach constitutes a rejection of a consistent and long accepted understanding of the proper relationship between courts and legislatures. The Court's insistence on the coherence and necessity of designating a single perspective represents an unjustified interference with legislative prerogatives. Modern scholarship on legislation, moreover, has suggested the inappropriateness and indeterminacy of the Court's project. This scholarship has demonstrated the difficulty of rigidly separating the different legislative perspectives. Many entities, for example, serve as both targets and beneficiaries of regulations. Laws reflect multiple goals and compromises. The attempt to single out a particular perspective as determinative will inevitably be arbitrary. Accordingly, although proponents of a unidimensional approach often assume the mantle of legal determinacy,[20] their claims ring hollow. The Court's adoption of a single per-

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18 As Cass Sunstein has argued, this favoring of putative targets over beneficiaries represents a return to the judicial mindset of the *Lochner* period. *See* Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 501–03 (1987) [hereinafter Sunstein, *Constitutionalism*]; Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 891–94 (1987) [hereinafter Sunstein, *Lochner's Legacy*]; Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1434–36, 1480–81 (1988) [hereinafter Sunstein, *Standing*]. The *Lochner*-era philosophy privileged common law baselines and viewed government intervention as a rupture of the natural order. *See* Sunstein, *Lochner's Legacy*, *supra*, at 874, 876–83. Sunstein built on the earlier work of the legal realists, who emphasized the government's role in defining legal relationships embodied in common law principles. *See* J.M. Balkin, *The Hohfeldian Approach to Law and Semiotics*, 44 U. MIAMI L. REV. 1119, 1124–25 (1990). The New Deal Court's rejection of *Lochner* recognized the artificiality of a privileged legal status quo. In validating the modern regulatory state, the New Deal Court acknowledged the parity of targets and beneficiaries of regulations. Governmental action may burden some, but inaction will burden others. Moreover, the distinction between action and inaction depends on the choice of perspectives. Only if the enforcement of contract, property, and trespass laws is ignored can the economics of "laissez-faire" be understood to reflect the absence of governmental intervention. This Article broadens and generalizes that critique as applied to the current Court.

19 *See* William W. Buzbee, *Expanding the Zone, Tilting the Field: Zone of Interests and Article III Standing Analysis After* Bennett v. Spear, 49 ADMIN. L. REV. 763, 766 (1997).

20 *See* Susan Bandes, Erie *and the History of the One True Federalism*, 110 YALE L.J. 829, 869–78 (2001) (reviewing EDWARD A. PURCELL, JR., BRANDEIS AND THE PROGRESSIVE CONSTITUTION: *ERIE*, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTI-

spective does not lend greater certainty to the law; rather, it relocates discretion from the legislature to the courts.

In place of the Court's narrow, unidimensional approach, this Article advances an alternate kind of review, which we term "legislativist." This legislativist approach acknowledges a role for judicial scrutiny of congressional power, but also recognizes the need to afford the legislature broad discretion in choosing the appropriate method for utilizing its authority. To ascertain what activities are relevant to a Commerce Clause challenge, courts should focus on the statutory text with all of its complexities, rather than reduce each law to some single, generalized subject. When exercising judicial review, courts should not impose their preferred perspective instrumentally to invalidate legislation. The commerce power belongs to Congress, and as long as a statute has a reasonable nexus to commerce when considered from some rational perspective, the Court may not substitute its judgment for that of Congress. Under the legislativist model, the courts would still administer the final exam, but Congress gets a choice of questions.

Part I develops the concept of the "regulatory prism" to illustrate the complex process through which legislatures produce statutes that reflect multiple goals, purposes, and compromises. Part II employs this concept of the regulatory prism as a framework for reexamining the evolution of Commerce Clause jurisprudence during the pre-1937, 1937 to 1995, and post-1995 periods. It shows how, by insisting on a quixotic search for a single regulatory goal motivating and justifying a given act of federal intervention, *Lopez* and its progeny constitute a decisive break with the previous half century of decisions. Building on the insights of recent scholarship in administrative law and legislation, Part III demonstrates the arbitrariness inherent in the designation of a single perspective as determinative. The complexity of the legislative process belies facile identification of a unitary activity, target, beneficiary, or purpose. Part IV contends that the Court's approach, while arbitrary, is not random. In a variety of areas, including Commerce Clause jurisprudence, the Court has focused on the common law right-holder as the fulcrum of its analyses. This framework tilts the doctrine against regulation because it inevitably casts the state as a suspect interloper. Part V outlines an alternative, "legislativist" approach to judicial review. This method retains meaningful judicial oversight, while avoiding the usurpation of legislative prerogative inherent in the Court's current unidimensional approach. Part V thereby refutes the Court's claim that its approach is necessary to avoid the abdication of judicial review.

ETH-CENTURY AMERICA (2000)) (discussing claims that the Court's current approach to federalism is necessary to ensure principled decision making).

I
THE REGULATORY PRISM CONCEPTION OF THE LEGISLATIVE PROCESS

In recent Commerce Clause cases, the Supreme Court has settled on a single perspective as determinative. The Court has not defended this unitary approach, nor has it acknowledged the variety of possible perspectives for analyzing legislation creating new regulatory schemes. Drawing on recent scholarship regarding the legislative process, this Article suggests that the image of the "regulatory prism" provides a useful framework for assessing legislation.[21] The prism metaphor helps to expose the shortcomings of the Court's current approach by highlighting two key concepts.

First, legislation can be analyzed from multiple perspectives. The Court's current approach does not recognize this multiplicity, nor does it justify an active role by the judiciary in determining the relevant perspective, as opposed to judicial deference to perspectives identified by the legislature. Second, the various perspectives often do not lend themselves to easy distinctions. The elements of legislation are positioned across a spectrum with indefinite boundaries. Labels such as "target" and "beneficiary" represent helpful ways of understanding the inputs and outputs of the legislative process. In many instances, though, rigidly distinguishing between targets and beneficiaries may prove impossible. Legal rules that require categorization of the different elements will entail uncertain and often arbitrary selections. To provide a framework for the discussion of Commerce Clause cases in Part II, this Part briefly introduces the concept of multiplicity. Part III provides an in-depth examination of the problems of indeterminacy that plague the Court's approach.

This Part suggests that, rather than examining statutes to identify a single relevant targeted activity, courts should view legislation and the legislative process as a more complex array of actors, motivations, and effects. Seldom is just one "activity" at issue in legislation, and seldom does a law touch upon only one domain of regulation. We suggest that conceiving of the legislative process as a "regulatory prism" is both true to most modern conceptions of the legislative process and a revealing way to recast the Supreme Court's shifting Commerce Clause jurisprudence.[22]

The process of legislative enactment starts with some impetus for a change from the status quo. Harms, social needs, interest group entreaties, agency calls for legislative change, anticipated political

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21 The "regulatory prism" also provides a useful account of the output of administrative agencies, but this Article focuses on legislative enactments.

22 *See infra* Part III.A.

gains, or any number of issues may lead legislators to consider action.[23] The initial impetus for legislative action can be analogized to a ray of light directed at a triangular prism. That energy in turn is transformed by an activated political process. Any such legislative process will involve at least three groups of actors.

Politicians themselves, be they legislators, executive officers, or regulators, will see potential benefits and harms in any given piece of legislation. Strong proponents of public choice analysis suggest that politicians are motivated by desire for votes or money,[24] but for our purposes it is enough to embrace a weak view of political motivation. In order for a legislative proposal to gain traction, politicians will need sufficient incentives to pursue legislative action. They typically will seek to mediate among diverse (and often competing) stakeholders and interested constituencies.[25] Politician motivation can be envisioned as one point on a corner of the triangular prism, represented by the point *P* on the diagram below.[26]

The targets of regulation—those entities likely to be constrained by the new law—will invariably be players in the legislative process. By targets (sometimes called "objects"), we refer, for example, to industries that may be required to modify modes of production to comply with environmental or occupational safety and health regulation. Such targets will sit on another point of the triangular prism, represented by the point *T*.

Any legislation will generate some benefits (or, perhaps, reduction of harms) for a beneficiary class, represented by the third triangular point, *B*. Beneficiary classes can take many forms, such as workers

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23 *See generally* DAVID R. MAYHEW, AMERICA'S CONGRESS: ACTIONS IN THE PUBLIC SPHERE, JAMES MADISON THROUGH NEWT GINGRICH (2000) (exploring how legislators' particular interests, constituent demands, beliefs and skills have influenced the political marks they have left); ABNER J. MIKVA & ERIC LANE, AN INTRODUCTION TO STATUTORY INTERPRETATION AND THE LEGISLATIVE PROCESS 57–100 (1997) (describing the legislative process).

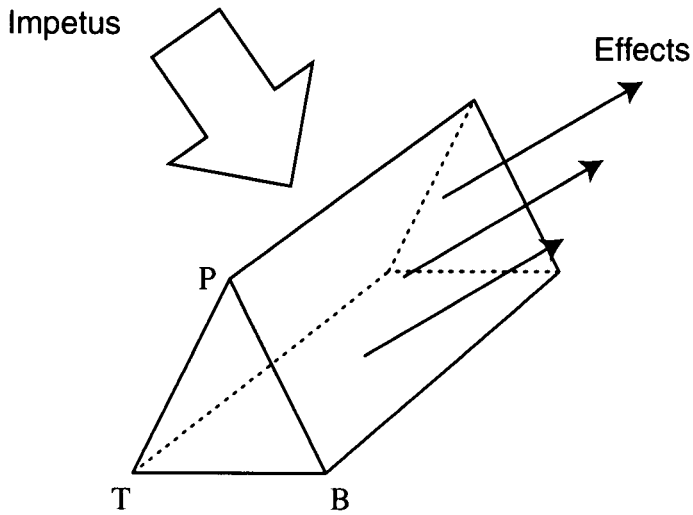
24 *See, e.g.*, FRED S. MCCHESNEY, MONEY FOR NOTHING: POLITICIANS, RENT EXTRACTION, AND POLITICAL EXTORTION (1997) (developing the theory that politicians will feign interest in political actions to attract money and support from interest groups). *See generally* DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE (1991) (reviewing and analyzing central public choice tenets).

25 *See, e.g.*, DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION *passim* (1974) (positing that federal legislators act overwhelmingly to advance their reelection prospects); *see also* MAYHEW, *supra* note 23 (exploring how legislators act with some autonomy from interest group forces and can influence the course of public policy through their choices and actions).

26 As this Article argues, legislative purpose is best understood as a spectrum of different purposes. For every statute, each legislator, as well as the legislature as a whole, will have a variety of different goals. *See* Kent Greenawalt, *Are Mental States Relevant for Statutory and Constitutional Interpretation?*, 85 CORNELL L. REV. 1609, 1627 (2000) ("Legislators may have views about what a specific provision accomplishes and broad attitudes about the purposes of a law. . . . More precisely, one could talk of a spectrum extending from the most immediate to the most ulterior objectives.").

protected by workplace safety measures, citizens protected from high levels of pollution by environmental protection laws, consumers protected from monopolistic merger activity by antitrust laws, or even environmental amenities protected by restrictions imposed on targets. Once enacted, legislation creates a further array of possible costs and benefits that can affect interests and entities beyond the most active participants in the legislative process. That array of costs and benefits of legislation, which this Article terms "effects," can be analogized to the refracted light emanating from a prism in an array of colors of the spectrum. The line between the gains of a beneficiary class and the broader beneficial effects of legislation is surely a blurred one.

The regulatory prism concept can thus be envisioned in the following manner:



This conceptualization of legislative motivation and legislative partisans is necessarily incomplete. In particular, the actual array of legislative players and motivations is far more complex,[27] especially in light of the battles waged to position items on the legislative agenda and the political logrolling in which politicians negotiate simultaneously over the terms of multiple bills.[28] Nevertheless, the idea that

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27 *Cf.* Matthew D. McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 431–32 (1989) (exploring the evolution of statutory debates over the Clean Air Act and the ways legislators use procedural provisions to enhance the likelihood that implementation will accord with their goals).

28 Indeed, given the far more complex reality, with multiple concerned groups and politicians and parties with divergent goals, *see* J.B. Ruhl, *Complexity Theory as a Paradigm for the Dynamical Law-and-Society System: A Wake-Up Call for Legal Reductionism and the Modern Administrative State*, 45 DUKE L.J. 849 *passim* (1996), a more accurate diagram might look like a large knot. Nevertheless, the simplified schematic offered here acknowledges a minimal and inevitably complex view of the legislative process and provides a more appropriate

legislation will typically reflect at least these partisans' views and purposes seems beyond debate. Laws seldom result from a legislator's moment of insight realized in silent meditation. Seldom, also, will a law be enacted that targets a harm if no one will perceive a benefit from that law. Only irrational politicians would pursue an agenda that creates only enemies.

We suggest that this simplified conception of the legislative process helps to highlight both the significant changes in the Supreme Court's Commerce Clause approach since 1995 and the reasons to reject the unidimensional conception of legislation embedded in that approach. As Part III discusses, this more nuanced view of the legislative process also sheds light on the Rehnquist Court's general tendency to use manipulable and indeterminate analytical approaches that empower courts to claim that there are single, determinate meanings in statutory texts or legislative materials.

II
THE COMMERCE CLAUSE AND THE NEW DEAL

The regulatory prism provides a framework for understanding the Court's evolving scrutiny of congressional power to regulate interstate commerce. Between 1937 and 1995, the Court utilized multiple perspectives to find commerce clause connections sufficient to justify the assertion of federal regulatory power. The Court's more restrictive view of congressional power in the pre-1937 and the post-1995 periods corresponds to a narrow focus on a single aspect of legislation. This Part traces these doctrinal developments in Commerce Clause jurisprudence, utilizing the regulatory prism framework to highlight both the nature and implications of these substantial methodological shifts.

A. The Purposes of the Commerce Clause

The historical context of the Commerce Clause provides a useful background for considering the Court's recent interpretations. Although accounts of the origins of the Commerce Clause vary, widespread agreement exists that the promotion of commerce was a central purpose of the Commerce Clause. One of the key concerns that underlay the call for a constitutional convention was the problem of states erecting barriers to commerce.[29] These local impediments

framework than the unidimensional perspective increasingly adopted by the Supreme Court.

29 *See* THE FEDERALIST NO. 42 (James Madison); Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 146 (2001) (asserting that the purpose underlying the Interstate Commerce Clause was the elimination of state trade barriers); Nelson & Pushaw, *supra* note 5, at 21–25 (describing the Commerce Clause as part of a

led to a perception of the need for centralized regulation to promote the nascent national economy.[30] The goal, in short, was to protect, encourage, and maintain commerce. Commerce was the end, not just the means.

B. Unidimensionalism in the Pre-1937 Period

At the beginning of the twentieth century, the Court's Commerce Clause scrutiny focused narrowly on the target of legislation. This limiting approach, coupled with the Court's categorical definition of activities that did or did not constitute "commerce," resulted in a restrictive interpretation of congressional power. To the extent that the Court took cognizance of other legislative inputs, such as the motives of legislators, it used these factors to limit further congressional authority. Over the first third of the twentieth century, new areas of potential federal regulation, such as railways, placed stress on the Court's restrictive, categorical approach. Finally, the Court broadened its perspective and began to validate legislation whenever commerce appeared in any of the beams refracted through the regulatory prism.

In the beginning of this period, the Court focused on categorical definitions of activities that did or did not constitute "commerce." The Court struck down legislation if it found that the regulated activity did not qualify as "commerce." Thus, if the Court deemed the target of regulation to be "manufacture," rather than "commerce," Congress had necessarily overstepped its authority. For example, *United States v. E.C. Knight Co.* presented a question of the constitutional scope of the Sherman Antitrust Act.[31] The Court examined whether preventing the monopolization of sugar refinement came within congressional power to regulate interstate commerce.[32] Although it acknowledged that the monopoly would affect interstate commerce, the Court insisted on focusing on the activity targeted by

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plan to remedy severe economic crisis resulting from the absence of national regulation); *see also* Daniel A. Farber, *The Constitution's Forgotten Cover Letter: An Essay on the New Federalism and the Original Understanding*, 94 MICH. L. REV. 615, 641 (1995) (noting that Washington's letter transmitting the Constitution to Congress emphasized the regulation of commerce as "one of the key purposes of the Constitution").

30 *See, e.g.*, United States v. The William, 28 F. Cas. 614, 620 (C.C.D. Mass. 1808) (No. 16,700) ("It is well understood, that the depressed state of American commerce, and complete experience of the inefficacy of state regulations, to apply a remedy, were among the great, procuring causes of the federal constitution."); THE FEDERALIST No. 11 (Alexander Hamilton); Jesse H. Choper, *Taming Congress's Power Under the Commerce Clause: What Does the Near Future Portend?*, 55 ARK. L. REV. 731, 756 (2003); Nelson & Pushaw, *supra* note 5, at 21–25.

31 *See* 156 U.S. 1 (1895).

32 *See id.* at 11–12.

the regulation, which it defined as the refinement of sugar.[33] The Court concluded that the refinement of sugar constituted "manufacture," not "commerce," and, therefore, that it did not fall within the ambit of the Interstate Commerce Clause.[34] As Justice Harlan's dissent emphasized, however, the Court could have focused instead on the intended benefits of the legislation.[35] By banning restraints on trade, Congress sought to promote the free flow of commerce. From the perspective of its intended effects, the legislation clearly constituted a regulation of interstate commerce. The then-prevailing manufacture/commerce dichotomy, however, yielded a singular judicial focus on the regulatory target, to the exclusion of other aspects of the legislation.[36]

In the pre-1937 period, the Court sometimes scrutinized the motives of the legislature as a way of providing a further check on congressional authority. In *Hammer v. Dagenhart*, for example, the Court considered a constitutional challenge to a federal statute prohibiting the interstate shipment of goods produced by child labor.[37] The legislation clearly concerned interstate commerce. Nevertheless, the Court scrutinized the overall statutory scheme and concluded that the Act did not in effect constitute a regulation of commerce, but instead "aim[ed]" to prohibit child labor in manufacturing enterprises.[38] Because of that prohibited legislative purpose, the Court held that the Act did not come within Congress's Commerce Clause authority.[39]

Cases involving instrumentalities of commerce put great stress on the Court's categorical distinctions. In this area, the Court softened

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33 *See id.* at 12.

34 *See id.* at 11–13, 16–18.

35 *See id.* at 44–46 (Harlan, J., dissenting) ("A decree recognizing the freedom of commercial intercourse as embracing the right to buy goods to be transported from one State to another, without . . . unlawful restraints imposed by combinations of corporations or individuals, . . . would tend to preserve the autonomy of the States, and protect the people . . . .").

36 The Court did permit federal antitrust regulation to extend to conduct indicating an intent to restrain interstate commerce. *See, e.g.*, United States v. Am. Tobacco Co., 221 U.S. 106, 181–83 (1911); Standard Oil Co. v. United States, 221 U.S. 1, 74–77 (1911); *see also* Barry Cushman, *Formalism and Realism in Commerce Clause Jurisprudence*, 67 U. CHI. L. REV. 1089, 1095–96 (2000) (discussing the Court's analysis in the *American Tobacco* and *Standard Oil* cases). One could understand these "intent" antitrust cases as indicating a continuing focus on the target of regulation, as it was the target's intent that was scrutinized.

37 *See* 247 U.S. 251, 268 & n.1 (1918), *overruled by* United States v. Darby, 312 U.S. 100 (1941).

38 *See id.* at 271–72.

39 The Court purported to disclaim scrutiny of legislative motives, but it clearly understood the ban on transportation as a means of accomplishing the prohibited goal of regulating manufacture. *See id.* at 276; *see also* Young, *supra* note 5, at 148 & n.52 (discussing the Court's analysis of legislative purpose as a means of identifying the contours of federal power).

its unidimensional approach to some extent.[40] In cases involving the regulation of railroads, most notably the *Shreveport Rate Cases*,[41] the Court permitted the regulation of activities that did not themselves constitute interstate commerce, as long as the activities had an economic impact on interstate commerce.[42] These cases emphasized that Congress has the power to protect interstate commerce, even if the source of the threat is solely intrastate activity. The Court allowed the Commerce Clause inquiry to focus on the benefits of the regulation. From that perspective, the connection to interstate commerce was obvious. Consistent with this broader perspective, the Court upheld the application of the federal Safety Appliance Acts to railroad cars used in intrastate commerce.[43] The Court emphasized the "plenary" nature of Congress's Commerce Clause authority and asserted that Congress's power "competently may be exerted to secure the safety of . . . persons and property transported . . . and of those who are employed in such transportation, no matter what may be the source of the dangers which threaten it."[44]

A few months later, again in the railroad context, the Court validated a congressional Act by looking to the regulatory beneficiary of that legislation. In the *Second Employers' Liability Cases*, the Court reiterated the principle that Congress could protect interstate commerce no matter what the source of the danger.[45] The Court upheld the federal Employers' Liability Act as applied to the negligence of railroad employees engaged in interstate commerce.[46] Insisting that congressional power turned on the threat to interstate commerce, rather than on the source of the threat, the Court criticized the opposing view as a "mistaken theory, in that it treats the source of the injury, rather than its effect upon interstate commerce, as the criterion of congressional power."[47] In the *Shreveport Rate Cases*, the Court extended this protective theory beyond the setting of safety regulations.[48] The *Shreveport Rate Cases* validated the federal power to

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40 Robert Post has argued that the experience of federal control of the railways during World War I demonstrated the need for integrated regulation of railroads and the impossibility of maintaining wholly separate state and federal spheres. *See* Robert Post, *Federalism in the Taft Court Era: Can It Be "Revived"?*, 51 DUKE L.J. 1513, 1550–55 (2002).

41 Houston, E. & W. Tex. Ry. Co. v. United States, 234 U.S. 342 (1914).

42 *See, e.g.*, JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 4.6, at 171–72 (6th ed. 2000).

43 *See* S. Ry. Co. v. United States, 222 U.S. 20, 23, 26–27 (1911).

44 *Id.* at 27.

45 223 U.S. 1, 51 (1912).

46 *See id.* at 51–52.

47 *Id.* at 51.

48 *See* Houston, E. & W. Tex. Ry. Co. v. United States, 234 U.S. 342 (1914). Grant Nelson and Robert Pushaw, Jr. have emphasized the importance of the "protective principle," *see* Nelson & Pushaw, *supra* note 5, at 147–49, which they understand as the idea that "Congress may protect the commerce it regulates by prohibiting noneconomic crimes or

regulate some intrastate railroad rates as part of its regulation of interstate rates.[49] Building on the safety cases, the Court asserted that, at least with regard to the instrumentalities of interstate commerce, Congress had the power to regulate intrastate activity that threatened the flow of interstate commerce.[50] In this particular area, the Court adopted a multidimensional view of the Commerce Clause, allowing legislation that benefited interstate commerce, even if the targeted activity did not itself constitute interstate commerce.[51]

In some other cases, the Court took a similarly broad approach in determining what circumstances would make legitimate the exercise of congressional Commerce Clause power. Specifically, the Court used the perspective of the regulatory beneficiary to validate regulation of activity that threatened the current of commerce. In *Stafford v. Wallace*, for example, the Court upheld the Packers and Stockyards Act of 1921, which authorized federal regulation of stockyards.[52] The Court characterized the stockyards as a "throat through which the current [of commerce] flows."[53] The Court then affirmed the power of Congress to remove obstructions to that flow, without regard to whether the obstructions could themselves be characterized as interstate commerce.[54] The Court asserted that the purpose of the legislative scheme—the removal of burdens on interstate commerce—rather than the characterization of the regulated activity itself, was dispositive.[55]

In support of this focus on the benefits of the regulation rather than the nature of the regulated activity, the *Stafford* Court quoted broad language from an earlier case, *United States v. Ferger*, refuting the contrary position.[56] In *Ferger*, the Court had stressed the fallacy of

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torts that interfere with or threaten such commerce," *id.* at 148 (citing United States v. Coombs, 37 U.S. (12 Pet.) 72 (1838)). They trace the principle to *United States v. Coombs*, in which the Supreme Court upheld a federal statute punishing theft from shipwrecked commercial vessels. *See Coombs*, 37 U.S. at 78–79; Nelson & Pushaw, *supra* note 5, at 148. It is clear that at different times the Court has interpreted this power more or less broadly and applied the principle to different categories of cases. A key to the development of the Court's New Deal jurisprudence was its expansion of this protective theory beyond the specific, limited categories of cases such as *Coombs* involving the regulation of instrumentalities of interstate commerce.

49 *See Houston, E. & W. Tex. Ry. Co.*, 234 U.S. at 349–50, 353.

50 *See id.* at 352–53. *See generally* Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1414–20 (1987) (discussing the *Shreveport Rate Cases*).

51 *See* Robert L. Stern, *The Commerce Clause and the National Economy, 1933–1946*, 59 HARV. L. REV. 645, 649–50 (1946) (noting the Court's broader view of congressional power in cases concerning railroad regulation).

52 *See* 258 U.S. 495, 512, 516–17, 521, 528 (1922).

53 *Id.* at 516.

54 The "obstruction" consisted of unfair and monopolistic business practices by those who controlled the stockyards. *See id.* at 514–15.

55 *See id.* at 518–21.

56 *See id.* at 521–22 (quoting United States v. Ferger, 250 U.S. 199, 203 (1919)).

considering only the direct target of the regulation: "[T]his mistakenly assumes that the power of Congress is to be necessarily tested by the intrinsic existence of commerce in the particular subject dealt with, instead of by the relation of that subject to commerce and its effect upon it."[57] The *Ferger* Court insisted that Congress could regulate acts that "are not interstate commerce in and of themselves" as long as those acts have an effect on interstate commerce.[58]

Through 1936, however, these invocations of the congressional power to protect interstate commerce had limited domains of application. The Court employed a set of categorical distinctions that bound the range of Congress's power to protect interstate commerce from intrastate harms. These distinctions were based on two key sets of dichotomies, drawn from other areas of the Court's jurisprudence: the direct/indirect effects doctrine and the public/private distinction.[59]

The Court sought to draw a line between activities with "direct" effects on commerce and those with mere "indirect" effects.[60] In evaluating Commerce Clause legislation, the Court would adopt the beneficiary perspective only with regard to activities that it deemed to have a sufficiently "direct" impact on commerce, such as the operation of railroads.[61] In cases such as *A.L.A. Schechter Poultry Corp. v. United States*[62] and *Carter v. Carter Coal Co.*,[63] the Court struck down congressional regulation of activities that the Court deemed to have at best an "indirect" effect on interstate commerce.[64]

The categories of direct and indirect effects and the related distinction between local and national conduct derived from the Court's Dormant Commerce Clause jurisprudence.[65] The Court, during the pre-1937 period, adopted a view of state and federal regulation as mutually exclusive in certain areas. Only in some domains did the Court

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57 *Ferger*, 250 U.S. at 203. The Court continued:

> We say mistakenly assumes, because we think it clear that if the proposition were sustained it would destroy the power of Congress to regulate, as obviously that power, if it is to exist, must include the authority to deal with obstructions to interstate commerce and with a host of other acts which, because of their relation to and influence upon interstate commerce, come within the power of Congress to regulate, although they are not interstate commerce in and of themselves.

Id. (citation omitted).

58 *See id.* at 203–04.

59 *See* Cushman, *supra* note 36, at 1113–14, 1127–28.

60 *See id.* at 1116–22.

61 *See, e.g.*, NOWAK & ROTUNDA, *supra* note 42, § 4.6, at 171–72.

62 *See* 295 U.S. 495, 548–50 (1935).

63 *See* 298 U.S. 238, 307–11 (1936).

64 *See id.*; 295 U.S. at 548–50.

65 *See* Cushman, *supra* note 36, at 1113–14; David E. Engdahl, *Casebooks and Constitutional Competency*, 21 SEATTLE U. L. REV. 741, 762 (1998) (book review); Lessig, *supra* note 9, at 146.

countenance concurrent state and federal regulation.[66] In other areas, the Court understood the Commerce Clause to mark the boundary between state and federal authority. With regard to these areas, if the Commerce Clause permitted the federal government to regulate an activity, then the negative implications of the Commerce Clause prohibited state regulation.[67] Recognizing the power of Congress to regulate in such areas thus created a zone immune from state control. The principle of exclusive spheres of jurisdiction, sometimes denominated "dual federalism,"[68] created pressure to limit the sweep of congressional power. By restricting federal authority, the Court's categorical approach empowered state regulation. Hence, the Court's Commerce Clause jurisprudence during this period did not necessarily reflect broad antiregulatory views; rather, judicial recognition of federal power meant the exclusion of state regulatory authority.[69]

Barry Cushman has emphasized that the public/private distinction, drawn from the Court's substantive due process jurisprudence, also served as a check on congressional Commerce Clause power.[70] The Court deemed railroads, other common carriers, and certain other businesses to be "affected with a public interest";[71] with regard to these enterprises, the Court allowed Congress to reach activities with commercial effects.[72] Indeed, the Court exhibited great deference to congressional judgment concerning the need for regulation of such businesses.[73] Activities of a private nature, by contrast, generally stood outside congressional authority.[74] Moreover, the public/private distinction operated in tandem with the direct/indirect effects dichotomy. Even if the regulated entity qualified as "affected with a public interest,"[75] Congress could not reach activities that had only

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66 *See* Cushman, *supra* note 36, at 1114–16.

67 *See id.* at 1124–25.

68 For discussions of dual federalism and its decline in the Commerce Clause context, see Young, *supra* note 5, at 142–52; Engdahl, *supra* note 65, at 761–72. *See also* Post, *supra* note 40, *passim* (employing the term "dual sovereignty" to express the concept of separate and exclusive spheres of state and federal authority).

69 *See* Cushman, *supra* note 36, at 1121 & n.150; *see also* Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1, 22 (1950) (noting that the Commerce Clause could inhibit state regulatory power). *But cf.* Post, *supra* note 40, at 1630 ("The Taft Court was a very conservative institution, with an ingrained aversion to government regulation.").

70 *See* BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION 143–47 (1998).

71 *See id.* at 144.

72 *See id.* at 143–44.

73 *See, e.g.*, Stafford v. Wallace, 258 U.S. 495, 521 (1922) ("Whatever amounts to more or less constant practice, and threatens to obstruct or unduly to burden the freedom of interstate commerce is within the regulatory power of Congress under the commerce clause, and it is primarily for Congress to consider and decide the fact of the danger and meet it.").

74 *See* CUSHMAN, *supra* note 70, at 143–44.

75 *See supra* note 64 and accompanying text.

"indirect" effects on commerce.[76] The various formal boundaries drawn by the Court limited the application of a multidimensional approach.

C. The Revolution of 1937: The Prism Revealed

In 1937, the Court generalized the multidimensional approach reflected in the railroad and current of commerce cases. *NLRB v. Jones & Laughlin Steel Corp.* concerned the application of the National Labor Relations Act of 1935 to a plant that manufactured steel.[77] Unlike railroads, the plant did not function as an instrumentality of interstate commerce. Production in the plant could plausibly have been characterized as part of the current of commerce or as exercising a direct effect on interstate commerce. In *Jones & Laughlin,* however, the Court cited the railroad and stream of commerce cases for the general proposition that Congress could enact legislation to protect interstate commerce.[78] The Court used the language of the prior cases, but detached the basic principles from their previously limited context.[79] In a crucial passage, the Court affirmed the general congressional power to regulate based on the resulting benefits to commerce:

> We do not find it necessary to determine whether these features of defendant's business dispose of the asserted analogy to the "stream of commerce" cases. The instances in which that metaphor has been used are but particular, and not exclusive, illustrations of the protective power which the government invokes in support of the present act. The congressional authority to protect interstate commerce from burdens and obstructions is not limited to transactions which can be deemed to be an essential part of a "flow" of interstate or foreign commerce. Burdens and obstructions may be due to injurious action springing from other sources. The fundamental principle is that the power to regulate commerce is the power to enact "all appropriate legislation" for its "protection or advancement"; to adopt measures "to promote its growth and insure its safety"; "to foster, protect, control, and restrain." *That power is plenary and may be exerted to protect interstate commerce "no matter what the source of the dangers which threaten it."*[80]

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76 *See* Cushman, *supra* note 36, at 1133.

77 *See* 301 U.S. 1, 22 (1937).

78 *See id.* at 36–37.

79 *See* Epstein, *supra* note 50, at 1446 ("[T]he Court in effect borrowed the language of those cases concerned with the instrumentalities of interstate commerce and applied it generally, as if the original subject-matter restriction had not been integral to the earlier decisions." (citation omitted)).

80 *Jones & Laughlin,* 301 U.S. at 36–37 (emphasis added) (citations omitted). Barry Cushman has argued that *Jones & Laughlin* was an incremental rather than revolutionary advance in the Court's Commerce Clause jurisprudence. For instance, he emphasizes that

Jones & Laughlin thus synthesized a broad principle of congressional power under the Commerce Clause. Rather than dividing congressional power into various rigidly defined categories, the Court recognized Congress's general authority to protect, sustain, and otherwise affect interstate commerce through regulation. Congress had power to grease the skids of commerce, not merely the power to act where the "particular subject dealt with" was itself imbued with commerce.[81] The instrumentality cases and the current of commerce cases became mere examples of this more general theory.[82] The Court thus expressed its willingness to accept a broad, multidimensional approach to congressional authority in all areas of its Commerce Clause jurisprudence. During this same period, the Court lost confidence in the categorical distinctions that previously had limited the scope of the multidimensional approach.[83]

Subsequent cases reiterated the general reach of congressional power. In *United States v. Wrightwood Dairy Co.*, for instance, the Court declared directly: "The commerce power is not confined in its exercise to the regulation of commerce among the states."[84] Rather, the power extended to regulation of intrastate activities as a means to the desired end of regulating interstate commerce.[85] Along these lines, *Wrightwood Dairy* cited the maxim stated in the *Second Employers' Liability Cases*, a railroad regulation decision: "It is the effect upon interstate commerce or upon the exercise of the power to regulate it, not the source of the injury which is the criterion of [congressional] power."[86] *Wrightwood Dairy* concerned the regulation of milk prices, not a railroad or other instrumentality of commerce.[87] The principle had by

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the opinion reflected the influences of the prior stream of commerce theories. *See* CUSHMAN, *supra* note 70, at 168–76. Regardless of whether one dates the fundamental transformation to *Jones & Laughlin* or to *United States v. Darby*, 312 U.S. 100 (1941) and *Wickard v. Filburn*, 317 U.S. 111 (1942), it is clear that the Court was moving toward an adoption of a general protective principle based on a synthesis of the Court's previous Commerce Clause cases.

81 *See* Stafford v. Wallace, 258 U.S. 495, 521 (1922) (noting the mistake of "'assum[ing] that the power of Congress is to be necessarily tested by the intrinsic existence of commerce in the particular subject dealt with, instead of by relation of that subject to commerce and its effect upon it'" (quoting United States v. Ferger, 250 U.S. 199, 203 (1919))).

82 *See, e.g., Jones & Laughlin*, 301 U.S. at 36 (stating that it is "not . . . necessary to determine whether these features of defendant's business dispose of the asserted analogy to the 'stream of commerce' cases").

83 *See* CUSHMAN, *supra* note 70, at 170 (describing the erosion of the Court's categorical distinctions); *see also* G. EDWARD WHITE, THE CONSTITUTION AND THE NEW DEAL 228–33 (2000) (discussing *Wickard*'s rejection of contemporaneous categories of Commerce Clause analysis).

84 315 U.S. 110, 119 (1942).

85 *See id.*

86 *Id.* at 121 (citing The Second Employers' Liability Cases, 223 U.S. 1, 51 (1912)).

87 *See id.* at 115–17.

this time become generalized. In exercising its commerce power, Congress was not limited to regulating activity that itself constituted interstate commerce. Congress could base its authority on the nature of the benefits to commerce, rather than on the characteristics of the target of the regulation. *Wickard v. Filburn* famously summarized this focus on the regulatory beneficiary and the irrelevance of the nature of the regulatory target:

> [E]ven if appellee's activity be local and *though it may not be regarded as commerce*, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as "direct" or "indirect."[88]

In *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, Justice Rutledge, writing for the Court, emphasized and defended the Court's generalizing of the theories first advanced in such railroad cases as the *Shreveport Rate Cases*.[89] Justice Rutledge described the formulation of the *Shreveport* doctrine as "a great turning point in the construction of the [Commerce Clause]."[90] He characterized the generalization of the *Shreveport* approach as an inevitable development in Commerce Clause jurisprudence:

> Once applied to transportation and the Interstate Commerce Acts, it was inevitable that the approach would be extended to the productive and industrial phases of the national economy and the statutes regulating them, including the Sherman Act. Time and events were disclosing ever more clearly the impact of their effects upon interstate trade and commerce. And this was posing the same necessity for regulation as in the field of transportation, in order to protect and preserve the national commerce and carry out Congress' policy regarding it.[91]

This understanding of a unified commerce power prevailed almost until the end of the twentieth century. The Court consistently upheld congressional legislation aimed at protecting or promoting interstate commerce without regard to the nature of the direct subject of the regulation. The Court continued to act on the theory, first developed with regard to railroads and then applied more generally, that Congress could address threats to interstate commerce, even if the source of the threats or the benefited parties did not themselves constitute or engage in interstate commerce.[92] In all areas of its jurisprudence, the Court insisted that benefits to interstate commerce jus-

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88 Wickard v. Filburn, 317 U.S. 111, 125 (1942) (emphasis added).

89 *See* 334 U.S. 219, 231–33 (1948).

90 *Id.* at 232.

91 *Id.* at 232 n.11.

92 In 1981, the United States Supreme Court summarized this longstanding view as follows:

tified congressional regulation. Moreover, the Court consistently rejected the position that activity subject to regulation must itself be characterized as interstate commerce in order for the regulation to be valid.[93] The multidimensional approach appeared deeply embedded in the Court's Commerce Clause jurisprudence.

During this period, the Court also disclaimed the authority to review the motives of Congress in enacting Commerce Clause legislation. *United States v. Darby* overruled *Hammer v. Dagenhart* and insisted that legislative purpose could not serve to undermine Commerce Clause authority.[94] In later cases challenging civil rights laws, the Court acknowledged the possibility of multiple congressional purposes.[95] As in *Darby*, the existence of noncommercial purposes did not doom the legislation at issue in those cases.[96]

D. Return of Unidimensionality

In 1995, the Supreme Court began limiting the scope of Congress's Commerce Clause authority. The Court refused to accept the multidimensional approach and instead picked out individual perspectives as the sole possible basis for validating congressional action. In so doing, the Court began to detach *Jones & Laughlin* and its progeny from their broad roots so as to narrow the scope of congressional power. By separating the various precedential strands joined in *Jones & Laughlin*, the Court undertook to limit Congress's ability to regu-

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> The denomination of an activity as a "local" or "intrastate" activity does not resolve the question whether Congress may regulate it under the Commerce Clause. . . . [T]he commerce power "extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce."

Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 281 (1981) (quoting United States v. Wrightwood Dairy Co., 315 U.S. 110, 119 (1942)). *Hodel* thus echoed the classic statement of the scope of congressional commerce power in *Gibbons v. Odgen*, 22 U.S. (9 Wheat.) 1, 194–97 (1824).

93 *See, e.g., id.* at 277 ("'[E]ven activity that is purely intrastate in character may be regulated by Congress, where the activity, combined with like conduct by others similarly situated, affects commerce among the States or with foreign nations.'" (quoting Fry v. United States, 421 U.S. 542, 547 (1975))).

94 United States v. Darby, 312 U.S. 100, 115–17 (1941), *overruling* Hammer v. Dagenhart, 247 U.S. 251 (1918). As the *Darby* Court noted:

> The motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restriction and over which the courts are given no control. . . . Whatever their motive and purpose, regulations of commerce which do not infringe some constitutional prohibition are within the plenary power conferred on Congress by the Commerce Clause.

Id. at 115.

95 *See, e.g.*, Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 257–58 (1964).

96 *See, e.g., id.* at 257 ("That Congress was legislating against moral wrongs . . . rendered its enactments no less valid.").

late conduct that substantially affected interstate commerce. In *United States v. Lopez* and *United States v. Morrison*, the Court compartmentalized its prior Commerce Clause cases to confine the broad language of the transportation cases.[97] The achievement of *Jones & Laughlin* had been to generalize the commerce-protecting theory of the transportation cases and to apply that principle more broadly in other factual contexts.[98] In *Lopez* and *Morrison*, the Court sought to dissolve the principle articulated in *Jones & Laughlin*. In short, unidimensionality had returned.

In *Lopez* and *Morrison*, the Court built on language from *Perez v. United States*[99] and *Hodel v. Virginia Surface Mining & Reclamation Ass'n*,[100] two earlier Commerce Clause cases.[101] In *Perez*, the Supreme Court considered the constitutionality of a federal statute criminalizing "loan sharking."[102] Although each individual instance of loan sharking might occur within a single state, the Court upheld the statute, deferring to Congress's judgment that, in the aggregate, extortionate credit transactions did affect interstate commerce.[103] *Perez* set forth the three-part categorization of Commerce Clause cases that has become central to the Court's approach. *Perez* asserted that "[t]he Commerce Clause reaches, in the main, three categories of problems. First, the use of channels of interstate or foreign commerce which Congress deems are being misused . . . . Second, protection of the instrumentalities of interstate commerce . . . or persons or things in commerce . . . . Third, those activities affecting commerce."[104] This categorization divided the different strands that the Court had brought together in *Jones & Laughlin*.[105] Although *Perez* identified the different strands, it did not state that these categories constitute the totality of the commerce power,[106] nor did it imply that each category had special principles that were inapplicable to the other categories. In this regard, *Perez* did not constitute a sharp break with the post-1937 tradition of Commerce Clause analysis.

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97 *See* United States v. Morrison, 529 U.S. 598, 607–09 (2000) ("[M]odern Commerce Clause jurisprudence has 'identified three broad *categories of activity* that Congress may regulate under its commerce power.'" (emphasis added) (quoting United States v. Lopez, 514 U.S. 549, 558 (1995))); *Lopez*, 514 U.S. at 553–559.

98 *See supra* notes 77–83 and accompanying text.

99 402 U.S. 146 (1971).

100 452 U.S. 264 (1981).

101 *See, e.g.*, *Lopez*, 514 U.S. at 557–58.

102 *See Perez*, 402 U.S. at 149–50.

103 *See id.* at 154–57.

104 *Id.* at 150 (citations omitted).

105 *See supra* Part II.B–C (discussing the pre-New Deal Court's categorical Commerce Clause analysis and the subsequent rise of multidimensional analysis culminating in *Jones & Laughlin*).

106 *See Perez*, 402 U.S. at 150 ("The Commerce Clause reaches, *in the main*, three categories of problems." (emphasis added)).

Hodel concerned the constitutionality of congressional regulation of strip mining.[107] Although a given mining operation might take place solely in one state, the Court asserted that Congress could regulate the activity as a means toward reaching interstate commerce.[108] *Hodel* thus reiterated the principle that it is the interstate commercial effects of an activity that render it subject to congressional regulation, without regard to the characteristics of the activity itself. The Court repeated the three-part Commerce Clause categorization, but again gave no indication that the categories were exclusive.[109]

In *Lopez*, the three-part categorization began to assume talismanic significance.[110] For the first time in over fifty years, the Court treated the categories as exclusive. The *Lopez* Court posited that the Gun-Free School Zones Act of 1990 did not fit into the first two categories covering regulation of the channels of interstate commerce and the protection of instrumentalities of interstate commerce or things in interstate commerce.[111] The Court then stated: "Thus, if [the law] is to be sustained, it must be under the third category as a regulation of an activity that substantially affects interstate commerce."[112] Rather than mere general descriptions of the broad scope of Congress's Commerce Clause authority, the categories had thus become restrictive definitions of that scope. In earlier cases, the categories had represented particular applications of broader Commerce Clause principles. Membership in one of the categories had been sufficient to ensure validation, but the Court had never explicitly required such membership as a necessary prerequisite to constitutionality.[113] In *Lopez*, the Court construed membership in one of the three categories as a necessary condition of the legitimate exercise of congressional Commerce Clause power.[114]

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107 See Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 268–72 (1981).

108 *See id.* at 281; *supra* note 92.

109 *See id.* at 276–77 ("[T]his Court has made clear that the commerce power extends not only to 'the use of channels of interstate or foreign commerce' and to 'protection of the instrumentalities of interstate commerce . . . or persons or things in commerce,' but also to 'activities affecting commerce.'" (alteration in original) (quoting *Perez*, 402 U.S. at 150)).

110 *See* 514 U.S. 549, 553–59 (1995).

111 *See id.* at 559.

112 *Id.* The *Lopez* Court also added the term "substantially" to the formulation of the "affecting commerce" category. *See id.* (concluding that the proper construction of the standard is "substantially affect[ing]" commerce (internal quotation marks omitted)). *Hodel* and *Perez* had stated the standard as "'activities affecting commerce,'" without the more demanding substantiality component. *See Hodel*, 452 U.S. at 277 (quoting *Perez*, 402 U.S. at 150).

113 *See supra* notes 106, 109 and accompanying text.

114 *See Lopez*, 514 U.S. at 558–59.

The *Lopez* Court also suggested new limits on the kinds of activities that could be reached under Congress's authority to regulate conduct substantially affecting interstate commerce. After stating that the challenged enactment had to fall into one of the enumerated categories, the Court suggested that congressional authority to reach activity that substantially affects interstate commerce extends only to the regulation of economic activity.[115] The Court restated its prior case law in this restrictive fashion: "[W]e have upheld a wide variety of congressional Acts regulating intrastate economic activity . . . ."[116] The Court then emphasized that the Gun-Free School Zones Act did not regulate economic activity.[117]

The Court's assertion that Congress can reach only economic activity that substantially affects interstate commerce stood in tension with the language of *Wickard v. Filburn.* In *Wickard,* the Court had stated that, "even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce."[118] Rather than confronting this language, the *Lopez* majority insisted that the facts of *Wickard,* concerning wheat production, supported the notion that Congress could reach only economic activity.[119] By recasting *Wickard* in this manner, the Court began to dismantle the core of the post-1937 revolution in Commerce Clause jurisprudence. The previously recognized congressional power to regulate activity based on its substantial effect on interstate commerce reflected the triumph of the perspective of the regulatory beneficiary. Under this test, congressional power depended not on the characteristics of the activity subject to regulation, but on the resulting effects on interstate commerce. In *Lopez,* however, the Court turned the inquiry on its head and shifted the focus back to the regulatory target. The *Lopez* Court insisted that the nexus with commerce be evaluated from the perspective of the regulated entity.[120] Instead of focusing on the commercial benefits of the regulation, the Court examined only the direct object of regulation.

United States v. Morrison continued this unidimensional approach.[121] The *Morrison* Court analyzed whether the civil enforcement provisions of the Violence Against Women Act of 1994 fit into

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115 *See id.* at 559–60.

116 *Id.* at 559.

117 *See id.* at 561–68.

118 317 U.S. 111, 125 (1942).

119 *See Lopez,* 514 U.S. at 560 ("Even *Wickard,* which is perhaps the most far reaching example of Commerce Clause authority over intrastate activity, involved economic activity in a way that the possession of a gun in a school zone does not.").

120 *See id.* at 561, 567.

121 *See* 529 U.S. 598, 613 (2000).

any of the three Commerce Clause categories. When the Court concluded that the Act could not be brought within any of these rubrics, it invalidated the statute.[122] The Court also asserted the centrality of the principle expressed in *Lopez* that only economic activity falls within the scope of Congress's power to regulate activity substantially affecting commerce.[123] The Court stressed that "[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity."[124] The Court stopped just short of asserting a categorical rule that the regulated activity must be economic. However, the Court left no doubt about the high, likely insuperable hurdle facing any argument that Congress can regulate noneconomic activity based on its effects on interstate commerce.[125]

Lopez and *Morrison* thus indicated that the economic nature of the regulated activity figures centrally in the Court's Commerce Clause analysis. Under these decisions, the perspective of the regulatory target gained preeminence. The Court appeared unwilling to focus on commercial benefits, commercial aspects of the problems triggering legislative action, or other commercial implications of a challenged statute.

Lopez and *Morrison* also sought to resurrect the local/national distinction that the Court had employed in the pre-1937 period.[126] The Court in *Lopez* and *Morrison* insisted on the necessity of maintaining separate spheres of local and national authority. In support of this principle, the Court invoked a quotation from *Jones & Laughlin* warning against "'obliterat[ing] the distinction between what is national and what is local.'"[127] As discussed above, at the time of *Jones & Laughlin*, the Commerce Clause did embody such a distinction.[128] In certain areas, the affirmative implications of the Clause and the Dormant Commerce Clause marked separate areas of exclusive jurisdiction. A broad interpretation of the Commerce Clause at that time disabled state regulatory authority, even in the absence of congressional intervention.[129] In the Court's modern jurisprudence, how-

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122 *See id.* at 609, 613–19. The petitioners in *Morrison* had not contended that the legislation in question fell under the first two categories. *See id.* at 609.

123 *See, e.g., id.* at 610 ("[A] fair reading of *Lopez* shows that the noneconomic, criminal nature of the conduct at issue was central to our decision in that case.").

124 *Id.* at 613.

125 *See id.* ("While we need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases, thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature.").

126 *See id.* at 608 & n.3, 617–18; United States v. Lopez, 514 U.S. 549, 557, 567 (1995).

127 *See Lopez*, 514 U.S. at 557 (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937)).

128 *See supra* notes 65–69 and accompanying text.

129 *See supra* note 67 and accompanying text.

ever, the Commerce Clause no longer demarcates such an impermeable border.[130] The states and the federal government now enjoy extensive areas of jurisdictional overlap.[131] The fear of excluding subject areas from state supervision by upholding federal authority no longer dogs the Commerce Clause. In this regard, the Court's resurrection of the local/national distinction is an anachronism, a throwback to the bygone era of dual federalism.[132]

The Court has not embraced unambiguously the unidimensional approacb, but its recent decisions point in that direction. Following *Morrison*, the Court decided two other significant Commerce Clause cases on statutory grounds. In both instances, the Court cited constitutional concerns as a reason for adopting a narrow construction of the statute at issue. While interpreting the federal arson statute narrowly, *Jones v. United States* suggested that the Court might acknowledge a variety of perspectives in analyzing the scope of the Commerce Clause power.[133] In *Solid Waste Agency v. United States Army Corps of Engineers* (*SWANCC*), however, the Court returned to its unidimensional approach.[134]

In the *Jones* decision, announced one week after *Morrison*, the Court considered the application of 18 U.S.C. § 844(i), the federal arson statute, to the destruction of a private dwelling.[135] Writing for a unanimous Court, Justice Ginsburg emphasized that the language of the statute limited its scope to the destruction of property "used" in interstate commerce.[136] The statute did not employ the broader language of "affecting commerce."[137] Justice Ginsburg asserted that, given the "used in commerce" language of the statute, the law required an analysis of the function of the building targeted and a determination of whether that function affected interstate commerce.[138] She concluded that the house at issue served merely as a private resi-

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130 *See* Post, *supra* note 40, at 1637 ("[T]he Taft Court's jurisprudence of congressional power was underwritten by complex congeries of very specific historical perspectives, all of which were to be radically modified during the New Deal era.").

131 *See* Young, *supra* note 5, at 150.

132 *See* Post, *supra* note 40, at 1638 ("We cannot resurrect pre–New Deal federalism without also resurrecting dual sovereignty."). Of course, a broad grant of Commerce Clause authority does enable Congress to interfere with state regulation. The Supremacy Clause gives Congress exclusive jurisdiction if it chooses to exercise its power. *See* U.S. CONST. art. VI, cl. 2. Recognizing the ability of Congress to regulate in an area, however, no longer automatically ousts states.

133 *See* 529 U.S. 848 (2000).

134 Solid Waste Agency v. United States Army Corps of Eng'rs, 531 U.S. 159 (2001).

135 *Jones*, 529 U.S. at 850.

136 *See id.* at 853–54.

137 *See id.* at 854.

138 *See id.* at 854–55 (citing United States v. Ryan, 9 F.3d 660, 675 (8th Cir. 1994) (Arnold, C.J., concurring in part and dissenting in part)).

dence.[139] This absence of commercial function placed the building outside of the scope of the statute.[140]

Although the Court in *Jones* found that the arson statute did not apply in the case at bar, the statutory test that the opinion advanced could have quite an expansive reach. By reviewing the function of the building subject to arson, the Court suggested a Commerce Clause inquiry not limited to a single dimension. That is, in emphasizing the purpose of the house, the Court in effect evaluated the statute based on the commercial benefits of the law, specifically whether the law was protecting a building involved in commerce. Notably, the Court did not focus on whether the activity of throwing a Molotov cocktail through the window of the house should be characterized as commercial in nature. By assessing the purpose of the house, rather than the nature of the criminal act, the Court implied a Commerce Clause framework that looks beyond the direct targets of the regulation.

Justice Ginsburg employed this broad approach to interpret the statute, not to evaluate the statute's validity as an exercise of congressional commerce power; nonetheless, the opinion strongly suggested that its analysis would also satisfy the Commerce Clause test. Justice Ginsburg emphasized that the statute used language more restrictive than the constitutional standard.[141] She also cited the canon of construing statutes so as to avoid serious constitutional questions.[142] Moreover, Justice Ginsburg quoted approvingly Judge Friendly's opinion in *United States v. Mennuti.*[143] In *Mennuti,* the Second Circuit interpreted the federal arson statute as not extending to arson of a private dwelling.[144] Writing for the panel, Judge Friendly suggested that the commercial effects of an act of arson could provide the necessary commercial nexus for purposes of the Commerce Clause.[145] The potentially broad implications of Justice Ginsburg's majority opinion in *Jones* led Justice Thomas to write a separate concurrence, joined by Justice Scalia, in which he sought to reserve the issue of whether the commercial use of a building, and thus the commercial effects of an arson, were sufficient to satisfy the Commerce Clause analysis.[146]

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139 *See id.* at 856.

140 *See id.* at 855–857.

141 *See id.* at 854 (contrasting the statutory phrase "used in" commerce with the broader standard of "affecting" commerce).

142 *See id.* at 857 (citing United States *ex rel.* Attorney Gen. v. Del. & Hudson Co., 213 U.S. 366, 408 (1909)).

143 *See id.* at 854 (quoting United States v. Mennuti, 639 F.2d 107, 110 (2d Cir. 1981)).

144 *See Mennuti,* 639 F.2d at 113.

145 *See id.* at 110 ("Congress did not define the crime described in [the federal arson statute] as the explosion of a building whose damage or destruction might affect interstate commerce as we assume it could constitutionally have done.").

146 *See* 529 U.S. at 860 (Thomas, J., concurring) ("In joining the Court's opinion, I express no view on the question whether the federal arson statute, as there construed, is

In contrast to *Jones*, the Court's five-to-four decision in *SWANCC* suggested a restrictive approach to Commerce Clause interpretation consistent with the framework applied in *Lopez* and *Morrison*, albeit with a new revelation of the risk of judicial manipulation of perspectives.[147] In *SWANCC*, the Court considered the authority of the Army Corps of Engineers to regulate a landfill.[148] Twenty-three cities and villages in the suburbs of Chicago had purchased land for the purpose of disposing of solid waste.[149] Because the creation of the disposal site required the filling of permanent and seasonal ponds that helped to support several species of migratory birds, the issue arose as to whether a permit was required under the Clean Water Act.[150] The Corps eventually asserted regulatory authority based on its "Migratory Bird Rule," which interpreted the Clean Water Act as extending to waters used by migratory birds.[151]

The Supreme Court ultimately decided the case on statutory grounds. The Court held that the presence of migratory birds did not bring isolated wetlands within the scope of the statute.[152] To support its interpretation of the Clean Water Act, which exhibited considerable tension with earlier constructions of the statute,[153] the Court emphasized the canon of construing statutes so as to avoid constitutional questions.[154] The Court made clear its concern that the Migratory

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constitutional in its application to all buildings used for commercial activities." (citation omitted)); *cf.* Young, *supra* note 5, at 160–61 (asserting that *Jones* "made clear that many forms of arson . . . remain within the reach of the federal commerce power").

147 For discussions of *SWANCC* and its relation to the Court's Commerce Clause jurisprudence, see Jonathan H. Adler, *The Ducks Stop Here? The Environmental Challenge to Federalism*, 9 SUP. CT. ECON. REV. 205, 215–21, 237 (2001); Christy H. Dral & Jerry J. Phillips, *Commerce by Another Name:* Lopez, Morrison, SWANCC, *and* Gibbs, 31 ENVTL. L. REP. 10413, 10419–20 (2001); William Funk, *The Court, the Clean Water Act, and the Constitution:* SWANCC *and Beyond*, 31 ENVTL. L. REP. 10741 (2001); Michael S. Greve, *Business, the States, and Federalism's Political Economy*, 25 HARV. J.L. & PUB. POL'Y 895, 908–11 (2002); Eric R. Coulson, Casenote, *Bird Hotels: Are the Resting Spots of Migratory Birds Entitled to Federal Government Protection Through the Commerce Clause?* Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, *531 U.S. 159 (2001)*, 26 S. ILL. U. L.J. 575, 576–78 (2002); Michelle J. Taylor, Note, Solid Waste Agency Northern Cook County v. Army Corps of Engineers*: The United States Supreme Court Invalidates the Migratory Bird Rule and Raises Questions About the Commerce Clause*, 79 U. DET. MERCY L. REV. 301, 311–21 (2002).

148 *See Solid Waste Agency*, 531 U.S. 159, 162 (2001).

149 *Id.* at 162–63.

150 *See id.* at 163–64.

151 *See id.* at 164.

152 *See id.* at 168.

153 *See* United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 133–35 (1985) (construing broadly the scope of the Clean Water Act).

154 *See Solid Waste Agency*, 531 U.S. at 172–73 (citing Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988)).

Bird Rule might exceed the authority granted to the national government by the Commerce Clause.[155]

The Court's concern about constitutional boundaries is surprising, given the regulations' substantial commercial nexus. The activity prohibited by the Migratory Bird Rule was a municipal landfill,[156] which appears to be a clear example of a commercial enterprise. The regulations were intended to protect birds that travel across state lines and that are central to a multibillion dollar industry of hunting and bird watching.[157] To create constitutional uncertainty, the Court had to suggest a potentially very narrow perspective:

> Respondents argue that the "Migratory Bird Rule" falls within Congress' power to regulate intrastate activities that "substantially affect" interstate commerce. They note that the protection of migratory birds is a "national interest of very nearly the first magnitude," and that, as the Court of Appeals found, millions of people spend over a billion dollars annually on recreational pursuits relating to migratory birds. These arguments raise significant constitutional questions. For example, we would have to evaluate the precise object or activity tbat, in the aggregate, substantially affects interstate commerce. This is not clear, for although the Corps has claimed jurisdiction over petitioner's land because it contains water areas used as babitat by migratory birds, respondents now, *post litem motam,* focus upon the fact that the regulated activity is petitioner's municipal landfill, whicb is "plainly of a commercial nature." But this is a far cry, indeed, from the "navigable waters" and "waters of the United States" to which the statute by its terms extends.[158]

This language represents a rather extreme form of the avoidance canon. Not only did the Court avoid reaching the constitutional question, but it also avoided defining the constitutional issue clearly. This portion of the opinion, featuring pronouns of uncertain reference ("this"), appears willfully obscure. The passage does make clear that the Court will scrutinize closely the "object or activity" that is claimed to affect substantially interstate commerce.[159] The opinion further suggests skepticism about the constitutionality of regulating this kind of landfill. The source of that constitutional skepticism, however, remains elusive. The Court acknowledges in the above passage the argument that the landfill is commercial. The Court also notes the commercial effects of the regulation: protecting migratory birds helps sustain a billon-dollar industry. From the perspective of either the tar-

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155 *See id.* at 174 (stating that the assertion of federal regulatory authority raised "significant constitutional questions").

156 *See id.* at 162–63.

157 *See id.* at 195 & n.17 (Stevens, J., dissenting).

158 *Id.* at 173 (citations omitted).

159 *See id.*

get or the beneficiary of the regulation, the nexus to commerce appears ample. So what issue gives rise to the Court's constitutional doubts? Rather than clarifying the question, the passage's final sentence stands as a non sequitur. Perhaps the statute does not reach the landfill at issue, but the Court has done nothing to explain why the boundaries of the Commerce Clause demand a limiting construction.

Prior to the Court's decisions in *Lopez* and *Morrison*, the commercial attributes of either the migratory birds or the landfill would have sufficed to validate the regulation. Given the Court's new unidimensional approach, however, matters are not so certain. Perhaps the landfill's effects on migratory birds are too attenuated.[160] Perhaps a municipal landfill is not really commercial. Perhaps it is the water in the threatened ponds itself that must be analyzed to ascertain the required commercial nexus.[161] The Court does not clarify any of these issues, but the unidimensional approach enables it later to strike down the regulation on any of these grounds. The Court's ability to choose a single perspective gives it great discretion to find the weakest Commerce Clause link.[162] The choice of the "precise object or activity" affecting commerce[163] is critical, but the Court gives no indication of how the choice should be made. *SWANCC* evokes the possibility of interpretive three-card monte. If the player reaches for one perspective, the Court can always choose another. From 1937 to 1995, any of the possible perspectives would have sufficed. But Congress must now find the right card, and the Court keeps the cards face down. Unidimensionality may constrain Congress, but it unleashes the Court.

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160 *See* Funk, *supra* note 147, at 10769–70.

161 *Compare* Robert H. Bork & Daniel E. Troy, *Locating the Boundaries: The Scope of Congress's Power to Regulate Commerce*, 25 HARV. J.L. & PUB. POL'Y 849, 890 (2002) (asserting that "the object regulated [in *SWANCC*] is the intrastate water"), *with* Marianne Moody Jennings & Nim Razook, United States v. Morrison*: Where the Commerce Clause Meets Civil Rights and Reasonable Minds Part Ways: A Point and Counterpoint from a Constitutional and Social Perspective*, 35 NEW ENG. L. REV. 23, 54 (2000) (asserting that, in protecting wetlands, "Congress is not regulating wetlands use; it is regulating the economic, and often commercial, activity of land use and development").

162 *See* Christine A. Klein, *The Environmental Commerce Clause*, 27 HARV. ENVTL. L. REV. 1, 38 (2003) (noting the implication in *SWANCC* that the Court might sometimes focus on the beneficiaries rather than on the targets of regulation, and further noting that, in the environmental area, such a focus on beneficiaries might have the effect of restricting congressional authority); *see also* Michael J. Gerhardt, *On Revolution and Wetland Regulations*, 90 GEO. L.J. 2143, 2163 (2002) (suggesting that the Court may be focusing its Commerce Clause analysis on the purpose of the regulation rather than on the nature of the regulated activity).

163 *See Solid Waste Agency*, 531 U.S. at 173.

E. The Renewed Interest in Purpose Analysis

Recent Commerce Clause cases also demonstrate a renewed interest in legislative purpose.[164] The *Lopez* majority included scrutiny of legislative purpose in its Commerce Clause assessment. In rejecting the Gun-Free School Zones Act, the Court had to confront the broad construction of the Commerce Clause in *Wickard v. Filburn*.[165] The Court attempted to distinguish *Wickard* in part by reference to congressional purpose, quoting language from *Wickard* stating that influencing the wheat market served as "'[o]ne of the primary purposes'" of the challenged enactment.[166] The *Lopez* Court thus attempted to read a commercial-purpose requirement back into post-1937 Commerce Clause doctrine.

In his concurrence, Justice Kennedy also emphasized the relevance of commercial purpose. He insisted that the Gun-Free School Zones Act differed from prior legislation upheld by the Court in that "neither the purposes nor the design of the statute has an evident commercial nexus."[167] The Court in *Morrison* quoted this language from Justice Kennedy's concurrence in support of its contention that the Violence Against Women Act was not a valid exercise of Congress's Commerce Clause authority.[168] In *SWANCC*, a concern about the noneconomic purpose of wetlands regulation may have driven the Court's skepticism about the constitutionality of the challenged regulatory regime.[169] Although the Court has not returned to the perspective of cases such as *Hammer v. Dagenhart*, in which improper motive sufficed to doom legislation,[170] the Court's recent references to legislative purpose emphasize the potential breadth of the Court's unidimensional approach. If the Court can pick one perspective, such as legislative purpose, to invalidate legislation, the Court wields great power indeed.

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164 For a discussion of the Court's apparent resort to legislative purpose analysis as a means of limiting congressional authority, see Buzbee & Schapiro, *supra* note 1, at 136–39.

165 *See* 317 U.S. 111, 123–25 (1942); *see also supra* note 88 and accompanying text (identifying the centrality of the nature of the benefit conferred in *Wickard*'s Commerce Clause analysis).

166 *See* United States v. Lopez, 514 U.S. 549, 560 (1995) (quoting *Wickard*, 317 U.S. at 128).

167 *Id.* at 580 (Kennedy, J., concurring).

168 *See* United States v. Morrison, 529 U.S. 598, 611 (2000) (quoting *Lopez*, 514 U.S. at 580 (Kennedy, J., concurring)); *see also id.* at 643–45 (Souter, J., dissenting) (noting the majority's renewed scrutiny of legislative purpose).

169 *See* Gerhardt, *supra* note 162, at 2163 ("In *Solid Waste Agency* and *Morrison*, the Court seems to suggest that what matters for purposes of aggregation in Commerce Clause cases is whether the basic purpose of the law is economic, not whether some economic activity is the means to achieve a noneconomic objective, such as clean water or air.").

170 *See* 247 U.S. 251, 271–72 (1918), *overruled by* United States v. Darby, 312 U.S. 100 (1941).

F. The Perspective Debate in the Lower Courts

The constitutionality of a variety of statutes will turn on whether courts generally adopt a unidimensional approach. In particular, many statutes will stand or fall depending on whether courts consider the commercial nature of the benefits produced by legislation. Recent lower court rulings have highlighted this issue.

In *Gibbs v. Babbitt*, for example, the Fourth Circuit upheld an application of the Endangered Species Act of 1973 (ESA) by focusing on regulatory benefits.[171] *Gibbs* concerned the constitutionality of regulations protecting the red wolf issued by the Fish and Wildlife Service, as authorized by the ESA.[172] The court validated the regulations based on the connection between the killing of the red wolf and interstate commerce.[173] In support of this conclusion, the court focused broadly on the benefits of the regulation. The court began by noting that farmers and ranchers kill red wolves primarily for economic reasons—to protect crops and livestock.[174] The court then emphasized that the protection of red wolves can result in significant commercial benefits by promoting tourism, scientific research, and the possibility of renewed trade in fur pelts.[175] The court summarized its conclusion by stating that "the protection of the red wolf . . . substantially affects interstate commerce."[176]

As this quotation illustrates, the *Gibbs* court focused on the commercial benefits of the regulation. The court held that such benefits constituted a sufficient nexus to interstate commerce to validate congressional regulation.[177] If the court had focused solely on the target of the regulation—the killing of red wolves, or perhaps the hunter—the argument that the regulation was a valid exercise of Commerce Clause power might have been more difficult to accept. One could argue that the regulated activity in this case was the killing of wolves, rather than tourism, scientific research, or pelt production. As Judge Luttig's dissent noted, it is not clear that the killing of red wolves can be characterized as an economic activity.[178]

The protection of the Delhi Sands Flower-Loving Fly provoked a similar judicial debate about the significance of the targets and benefi-

171 214 F.3d 483, 487 (4th Cir. 2000).
172 *See id.* at 487–88.
173 *See id.* at 490–99.
174 *Id.* at 492.
175 *See id.* at 492–95.
176 *Id.* at 497.
177 *See id.*
178 *See id.* at 507 (Luttig, J., dissenting).

ciaries of Commerce Clause regulation.[179] In *National Ass'n of Home Builders v. Babbitt*, the D.C. Circuit considered whether the ESA could constitutionally be applied to the Fly, an endangered species located only in California.[180] The judges hearing the case each filed a separate opinion; two concurring judges concluded, based on different analyses, that the ESA was constitutional as applied. Judge Wald, one of the two judges voting to uphold the law, argued that the commercial effects of the regulation validated the exercise of federal commerce power.[181] She emphasized that safeguarding the Fly prevented the erosion of biodiversity and thus protected future interstate commerce.[182] Judge Henderson, who also voted to uphold the regulation, similarly relied on the commercial impact of the regulation.[183] Agreeing in part with Judge Wald's opinion, Judge Henderson stressed that the reduction in biodiversity could harm interstate commerce.[184] Judge Henderson further looked at the regulatory targets, noting that, in this case, the regulation affected specific commercial developments, namely, the construction of a hospital and the redesign of a traffic intersection.[185] Writing in dissent, Judge Sentelle questioned the appropriateness of reliance on the benefits of the regulation to justify the exercise of congressional power.[186] Judge Sentelle's reasoning focused on the general category of the regulation at issue—land use policies.[187] He rejected the arguments of Judge Wald and Judge Henderson because, in his view, it is the activity directly regulated that must have a connection to interstate commerce.[188] The constitutional issue in *National Ass'n of Home Builders* thus depended on which and how many perspectives could be employed in scrutinizing the legislation.

The Freedom of Access to Clinic Entrances Act of 1994 (FACE) provides another example of the significance of the dimensionality debate and further reveals how the courts' adoption of a unidimensional or multidimensional perspective makes a constitutional differ-

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179 John Copeland Nagle's insightful analysis of this debate highlights the importance in Commerce Clause analysis of the choice of the "activity" to be examined for substantial effects on interstate commerce. *See* Nagle, *supra* note 9, at 209.

180 *See* 130 F.3d 1041, 1043 (D.C. Cir. 1997).

181 *See id.* at 1052–57. Judge Wald also determined that the law was a valid regulation of the channels of interstate commerce. *See id.* at 1046–49.

182 *See id.* at 1052–54.

183 *See id.* at 1057–60 (Henderson, J., concurring).

184 *See id.* at 1058–59 (Henderson, J., concurring).

185 *Id.* at 1059 (Henderson, J., concurring).

186 *See id.* at 1064–67 (Sentelle, J., dissenting).

187 *See id.* at 1064 (Sentelle, J., dissenting) ("The activity regulated in the present case involves local land use, a . . . traditional stronghold of state authority.").

188 *See id.* at 1067 (Sentelle, J. dissenting) ("Nowhere is it suggested that Congress can regulate activities not having a substantial effect on commerce because the regulation itself can be crafted in such a fashion as to have such an effect.").

ence. In *United States v. Gregg*, the Third Circuit upheld the constitutionality of FACE as applied to defendants obstructing access to a reproductive health clinic.[189] In an opinion by Judge Oakes, the court acknowledged that the economic nature of the activity at issue played a central role in the Commerce Clause analysis.[190] The court argued that economic activity can be understood in "broad terms."[191] In that regard, the court asserted that the protest activity prohibited by FACE obstructed economic activity—provision of reproductive health services—and thus had economic effects.[192] The court concluded that the Constitution gives Congress the authority to enact FACE as a means of facilitating interstate commerce.[193] Dissenting, Judge Weis insisted that it is the character of the conduct directly regulated that is determinative in Commerce Clause analysis.[194] With regard to FACE, he contended that the regulated activity, consisting of certain kinds of protest and obstruction, was noncommercial.[195] Judge Weis concluded that, because the regulated conduct was noncommercial, the statute could not be a valid exercise of congressional Commerce Clause authority.[196] The commercial effects of the regulated protest activity did not render the activity itself commercial.[197] Thus, the dispute between the majority and the dissent in *Gregg* turned on whether the commercial benefits of the regulation brought it within congressional power.

G. The Rise and Decline of Multidimensional Review

This Part has discussed the development of the Court's Commerce Clause analysis over the course of the twentieth century. The overall tale is familiar, by now almost classic. Before 1937, the Court often strictly scrutinized congressional exercises of the commerce power.[198] After 1937, the Court adopted a more deferential posture and found no enactment to exceed congressional power.[199] Beginning with the *Lopez* decision in 1995, however, the Court resumed a

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189 *See* 226 F.3d 253, 265–67 (3d Cir. 2000).

190 *Id.* at 262.

191 *See id.*

192 *Id.* ("[T]he misconduct regulated by FACE, although not motivated by commercial concerns, has an effect which is, at its essence, economic.").

193 *See id.* at 267.

194 *See id.* at 269–71 (Weis, J., dissenting).

195 *See id.* at 269–70 (Weis, J., dissenting) ("[A] protester's conduct . . . cannot in any sense be deemed economic or commercial in character.").

196 *See id.* at 273–74 (Weis, J., dissenting).

197 *Id.* at 269–71 (Weis, J., dissenting).

198 *See supra* Part II.B.

199 *See supra* Part II.C.

more rigorous review of congressional action under the Commerce Clause.[200]

This Part has placed that story in a particular framework, emphasizing the different dimensions of Supreme Court review. Specifically, this Part has explored how the Court's willingness to consider multiple perspectives after 1937 was central to the transformation of its Commerce Clause jurisprudence.[201] Rather than focus exclusively on the nature of the conduct directly regulated, the Court began to understand the Constitution as allowing Congress to reach activity based on its commercial effects. By broadening its view of the statutory scheme to consider the commercial benefits of legislation, the Court empowered Congress to reach a wider range of conduct. The evolution of its Commerce Clause jurisprudence thus reflects the Court's changing views on the perspectives from which to consider the nexus to commerce.

The post-1937 expansion in perspective was not entirely novel. The Court previously had adopted a broad, multidimensional approach in interpreting the Commerce Clause, but only in particular areas.[202] The pre-New Deal Court understood Commerce Clause cases as fitting into distinct categories, and it applied different rules to the various categories.[203] The Court approved of the exercise of congressional power to protect commerce, but only in certain domains, such as regulating instrumentalities of interstate commerce and regulating activities obstructing the current of commerce.[204] This categorical approach limited the reach of congressional power. The categories allowed the Court to focus on the beneficiaries of commercial regulation in certain areas, and to ignore them in others. The categorical framework enabled the Court to fashion doctrines that responded to selected historical developments, while limiting the explosive potential of the doctrines.

In *NLRB v. Jones & Laughlin Steel Corp.*, the Court began to disassemble the categorical framework for addressing Commerce Clause questions.[205] The lines began to seem artificial, and the Court began to understand the stream of commerce cases as exemplary, rather than exceptional. In characteristically revolutionary fashion, anomaly became paradigm. The Court accepted the general principle that Commerce Clause legislation may be valid based on the regulated ac-

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200 *See supra* Part II.D.

201 *See supra* Part II.C.

202 *See supra* notes 41–58 and accompanying text.

203 *See supra* notes 59–76 and accompanying text.

204 *See supra* Part II.B.

205 *See* CUSHMAN, *supra* note 70, at 169–70 (discussing the "deformalization" of the Court's categorical distinctions); *see also supra* notes 70–76 and accompanying text (discussing *Jones & Laughlin*).

tivity's effects on commerce.[206] With the decline of the categorical approach, multidimensionality extended to all areas of the Court's Commerce Clause jurisprudence. Broad validation of congressional enactments from 1937 to 1995 flowed from this expansion of permissible perspectives.[207] The Court's recent Commerce Clause cases, however, have suggested a return to unidimensionality.[208] The Court seems poised once again to focus on a single perspective, generally that of the target of the legislation. This singular focus threatens the validity of a variety of federal statutes.

III

THE REGULATORY PRISM AND THE QUEST FOR INTERPRETIVE SINGULARITY: THE INSIGHTS OF THE PURPOSE ANALYSIS CRITIQUE

The Court's Commerce Clause jurisprudence shows a shift from a narrow understanding of congressional power prior to 1937 to a more robust view in the period from 1937 to 1995. During this sixty year span, numerous types of commerce-related links sufficed to justify federal regulation. Most significantly, the transformative pre-1995 cases sometimes focused on the harms to be remedied by congressional action (the legislative impetus in our regulatory prism conception), the nature of the regulatory targets or the targets' activities, the benefits to beneficiary classes, or broader beneficial effects on commerce, even if the legislatively targeted activity was not itself commerce. Since *Lopez*, however, the Court has narrowed its focus. In its three most significant and recent Commerce Clause cases, the Court has looked for a single, relevant commercial target without conceding the arrogation of congressional power inherent in this selection process.[209] The coupling of a search for a single, particular relevant activity with the new requirement that the Court-defined relevant activity itself be commercial or economic[210] has made the Court's selection of a single relevant perspective the crucial and often fatal interpretive move.

This Part illuminates the Court's approach by reference to other quests for interpretive singularity. To highlight the flaws of the Court's new Commerce Clause methodology, this Part builds on well-developed criticism of such interpretive reductionism in the context of statutory construction. It shows how the Court's recent Commerce Clause cases necessarily involve an analytical reduction of the com-

206 *See supra* notes 77–80 and accompanying text.

207 *See supra* Part II.C.

208 *See supra* Part II.D.

209 *See supra* Part II.D.

210 For a discussion of whether the Court uses the terms "economic" and "commercial" interchangeably, see *supra* note 5.

plexities of legislation in a manner resembling these much-criticized modes of statutory interpretation. In particular, the Court's unidimensional Commerce Clause approach shares attributes and logic flaws with other reductionist approaches to statutory interpretation that focus upon only one legislative purpose to the neglect of other, less obvious legislative purposes or compromises.[211]

Whether examined in the context of a constitutional challenge under the Commerce Clause or of a debate over statutory meaning, laws tend to have purposes, not *a* purpose, and to reflect compromises. Interpretive attempts to reduce a law to a single purpose, or to assert that a law relates only to a particular activity or must be viewed through a single perspective, are problematic. As the concept of the regulatory prism suggests, not only could one focus on the target, the beneficiary, the motivation, or the effects of legislation, but virtually every statute implicates multiple targets, beneficiaries, motivations, and effects.[212] Much as modes of statutory interpretation that privilege only one legislative purpose empower courts to make politicized or arbitrary choices, a Commerce Clause analysis that recognizes only one relevant activity or perspective turns a previously deferential framework allowing laws to pass muster in numerous ways into a simplistic and undeferential framework rendering far easier judicial declarations of unconstitutionality.

This Part suggests that a review of the burgeoning literature on statutory interpretation, especially debates over how courts should assess and consider statutory purposes, reveals the problematic nature of the Court's new reductionist, unidimensional Commerce Clause methodology. As recent investigations of the legislative and judicial process highlight, the fundamental problem lies not in the Court's picking the "wrong" perspective, but in the Court's apparent belief that it can find a principled basis for isolating any single perspective as dispositive. In this regard, two methodological clarifications are in order. First, although the Article finds much to credit in the criticisms of purposive statutory interpretation explored in this Part (many articulated by proponents of textualist interpretive modes), this Article's argument does not hinge on taking sides here on our preferred approach to statutory construction. It relies instead on largely unanswered critiques of the search for a single legislative purpose.[213] Second, this Article does not assert that the Court has treated a uni-

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211 *See infra* Part III.A.1.

212 *See supra* Part I.

213 Whether, despite these serious flaws, purposive methods of statutory interpretation prove superior to their competitors presents a separate question beyond the scope of this Article. The ultimate choice of an interpretive method involves complex, often context-specific assessments, including calculation of the relative strengths and weaknesses of competing theories in a world in which every method is imperfect.

tary legislative purpose as determinative in Commerce Clause cases.[214] Rather, it argues that the Court has extracted from each statute a single "activity" to feed into its Commerce Clause analysis. This process of extraction, with its attendant distortion, displays the same flaws that infect modes of statutory construction based on assignment of a single legislative purpose.

To put this argument in context, consider the situation in *SWANCC* and imagine a rule that prohibits development on wetlands that serve as habitats for migratory birds. Is the law "really" about (a) construction, (b) land use, (c) water, (d) birds, or (e) all of the above? Recent Commerce Clause cases indicate that the Court thinks (e) is not an acceptable response. The choice among the other answers is not an easy one. The proper characterization of the provision inevitably involves issues of statutory construction, and recent debates about statutory interpretation emphasize the arbitrariness of any judicially mandated selection of a single activity. Far from offering assistance to the Court's unidimensional methodology, the literature on statutory construction demonstrates the flaws of any such reductionist project.

A. The Legislative Purpose Critique and Commerce "Activities"

Judicial and scholarly critiques of "purposive" statutory interpretation highlight the questionable analytical assumptions implicit in the search for a single relevant activity in assessing federal Commerce Clause power.[215] In particular, this Article suggests that, just as the search for a single or overriding statutory purpose is ill-fated and subject to judicial abuse, the unidimensional Commerce Clause approach necessarily ignores a far more complex legislative reality and therefore is similarly vulnerable to judicial error and overreaching. If courts

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214 The Court, however, has shown increased attention to questions of statutory purpose in this area. *See supra* Part II.E.

215 In an apparently paradoxical stance, which this Article reconciles later, *see infra* Part IV, textualist proponents who criticize purposive modes of statutory interpretation have embraced a Commerce Clause jurisprudence that adopts a unidimensional commercial activity perspective. The five-Justice majority recasting Commerce Clause jurisprudence includes Chief Justice Rehnquist and Justices Scalia, Thomas, Kennedy, and O'Connor. *See, e.g.*, United States v. Morrison, 529 U.S. 598 (2000); United States v. Lopez, 514 U.S. 549 (1995). These Justices, particularly Justices Scalia and Thomas, have been among the most ardent advocates of textualism and critics of recourse to legislative history. For articles discussing the content and rationale of this new textualism, see, for example, William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990); Bradley C. Karkkainen, *"Plain Meaning": Justice Scalia's Jurisprudence of Strict Statutory Construction*, 17 HARV. J.L. & PUB. POL'Y 401 (1994). As this Article later suggests, these apparently inconsistent analytical techniques yield consistent results insofar as they give courts enhanced power to override political branch determinations. Both modes of analysis facilitate a judicial antiregulatory agenda. *See infra* Part IV.

should be "faithful agents"[216] of the legislature and must be constrained from overstepping their powers—two central tenets of textualism and the critique of purposivist interpretation—then the Court's newly emergent unidimensional "activity" analysis should be discarded.

1. *Statutes' Multiple Purposes*

The textualist critique of purposive statutory interpretation illuminates the conceptual and practical flaws in privileging a single legislative purpose or relevant activity. References to analysis of statutory purpose and "purposivist" interpretation have several distinct elements. The textualist critique of judicial "purpose" analysis is not rooted in the idea that legislators and other politicians act without goals or purposes. Virtually all scholars of the legislative process start with the working assumption that political actors act in a purposive manner, in the sense of trying to achieve particular goals.[217]

Instead, the textualist discomfort witb purposive interpretation is rooted first in the primacy of the written statutory text. The heart of this critique is that courts should act as faithful agents of the legislature by enforcing statutory law as written.[218] Judicial constructions of statutory law contrary to the written text, whether expanding its reach to circumstances not specified in the law or perhaps carving out exclusions for areas apparently covered, are viewed as anathema. As Judge Easterbrook has argued, relying on "legislative history and an imputed 'spirit' to convert one approach into another dishonors the legislative choice as effectively as expressly refusing to follow the law."[219] As he further stated in *Walton v. United Consumers Club, Inc.*, "[c]ourts should confine their attention to the purposes Congress sought to achieve by

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216 On the concept of judges as faithful agents see, for example, John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 9–22 (2001).

217 The assumption that political actors engage in purposive activity is widely embraced. Advocates of enforcement of the particular "legislative bargain," such as Judge Easterbrook, start from an assumption of purposive activity and call for interpretation of laws to further the "contractual" bargain struck. *See* Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 544–49 (1983). Advocates of judicial construction of statutes to further "public-regarding" legislative ends also assume purposive political activity, but suggest that courts enforce only the public regarding bargain. *See, e.g.*, Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223 (1986). Moreover, advocates of expansive readings of statutes to further basic legislative purposes similarly start by assuming that political actors advocate purposefully for their preferred ends. Even Kenneth Shepsle, who posits that the many steps and actors in the legislative process produce legislation that is likely to be incoherent, Kenneth A. Shepsle, *Congress Is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239, 241–42, 242 n.6 (1992), starts from the assumption that legislative actors will strive purposefully to further their goals, *see id.* at 241–45.

218 *See supra* note 216.

219 Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61, 68 (1994).

the words it used. We interpret texts. The invocation of disembodied purposes, reasons cut loose from language, is a sure way to frustrate rather than implement these texts."[220]

The roots of this preference for text over broader research efforts to glean statutory purpose are several fold. The first is rooted in legislative supremacy and separation of powers conceptions.[221] Under this view, the law that the legislature and president actually enact should be the law followed by the courts.[222] Outside the common law context, courts should not create law and should resist the temptation to recast the law in accordance with each judge's notions of sound policy.[223] In his essay on interpretation, Justice Scalia criticizes importation into the statutory interpretation arena of the judicial common law exercise that relies on judicial creativity in discerning and furthering public goals.[224] After all, he observes, "[w]e live in an age of legislation, and most new law is statutory law."[225] This first rationale thus calls for judicial grappling with a statute's text in all of its complexity.

The second rationale for the textualist critique of purposive interpretation—the inevitability of compromise in legislation—is of greater salience to this Article's critique of recent Commerce Clause jurisprudence. Laws seldom have a unitary "purpose," and each law's purposes may not be apparent from review only of the statutory text.[226] Legislative compromise is the norm, not the exception. Most bills result from individual and interest group support, and once proposed, quickly will attract the attention of affected constituencies.[227] By threatening status quo arrangements, most proposed bills will engender opposition and interest group activity, not just from the targets of potential regulation, but also from others who might indirectly suffer adverse effects.[228] Similarly, stakeholders advocating a

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220 786 F.2d 303, 310 (7th Cir. 1986) (Easterbrook, J.).

221 *See* Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281, 291, 293 (1989) (analyzing implications of legislative supremacy for various interpretive approaches).

222 *See id.* at 293 (acknowledging constitutional importance of courts "follow[ing] an admittedly constitutional statute" but noting inevitability of open interpretive issues).

223 *See* Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 12–14 (1997).

224 *See id.*

225 *Id.* at 13.

226 *See* ANDREI MARMOR, INTERPRETATION AND LEGAL THEORY 166 (1992) ("Apart from the aims which are manifest in the language of the law itself, the legislators are likely to have had a variety of . . . *further intentions*, in enacting the law." (footnote omitted)).

227 *See generally* Peter L. Strauss, *The Courts and Congress: Should Judges Disdain Political History?*, 98 COLUM. L. REV. 242, 249–53 (1998) (discussing reasons judges should and historically have considered "political context" in interpreting statutes).

228 Fred McChesney posits that politicians will propose laws that are unlikely to be politically viable in order to attract interest group attention and campaign contributions. *See* MCCHESNEY, *supra* note 24, *passim*.

change in the law often will pick up additional support from others who see ancillary benefits in the proposal.[229] Politicians attempting to mediate conflicting public and private stakeholder views will assess a complex array of variables to figure out whether to support, oppose, or seek changes in proposed legislation.[230] Advocates of legislative change will generally need to garner support from reluctant legislative peers, typically by offering compromise language, additional text, ambiguous language that avoids resolution of the dispute, or support for a wholly unrelated bill.[231] This last type of cross-statutory bargaining, often referred to as logrolling, means that legislative compromises may not be evident in particular textual limitations.[232]

Writing for the majority in *Board of Governors of the Federal Reserve System v. Dimension Financial Corp.*,[233] Chief Justice Burger pointed to the likelihood of compromise as one reason why courts and litigants should avoid attribution of a single overriding purpose to a statute:

> Application of "broad purposes" of legislation at the expense of specific provisions ignores the complexity of the problems Congress is called upon to address and the dynamics of legislative action. Congress may be unanimous in its intent to stamp out some vague social or economic evil; however, because its Members may differ sharply on the means for effectuating that intent, the final language of the legislation may reflect hard-fought compromises. Invocation of the "plain purpose" of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise and, in the end, prevents the effectuation of congressional intent.[234]

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229 *See, e.g.*, BRUCE A. ACKERMAN & WILLIAM T. HASSLER, CLEAN COAL/DIRTY AIR 44–58, 88–90, 97–103 (1981) (discussing how diverse politicians and factions with disparate goals combined to embrace Clean Air Act provisions that arguably were imprudent and inefficient).

230 *See id.*; *see also* R. DOUGLAS ARNOLD, THE LOGIC OF CONGRESSIONAL ACTION 88–118 (1990) (examining strategies legislators use to assemble winning political coalitions).

231 For a discussion of the role of statutory ambiguity in legislative action, see Joseph A. Grundfest & A.C. Pritchard, *Statutes with Multiple Personality Disorders: The Value of Ambiguity in Statutory Design and Interpretation*, 54 STAN. L. REV. 627, 637–42 (2002).

232 For discussions of the theory of logrolling, see JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY 131–45 (5th prtg. 1974); DENNIS C. MUELLER, PUBLIC CHOICE II 82–86 (1989) (illustrating how logrolling increases utility to the majority while externalizing the costs to minorities). For an analysis of the operation of logrolling in Congress and of its significance for statutory construction, see Sherman J. Clark, *A Populist Critique of Direct Democracy*, 112 HARV. L. REV. 434, 456–58 (1998) (noting arguments that legislative logrolling may protect minority groups); Easterbrook, *supra* note 217, at 548 (arguing that logrolling poses great problems for a court attempting to ascertain the legislature's overall design); David B. Spence, *A Public Choice Progressivism, Continued*, 87 CORNELL L. REV. 397, 441 (2002) (positing that Congress tries to stop itself from logrolling by passing statutes such as the Line Item Veto Act).

233 474 U.S. 361 (1986).

234 *Id.* at 373–74.

Thus, compromise is a pervasive feature of statutory law. Laws emerge from a complex process in which interest group pressure, political veto gates, party politics, multiple statute logrolling, and compromise create laws that reflect competing considerations and negotiations that may not be evident in the ultimate statutory text.[235]

A second, related criticism of purposive statutory interpretation is that a statute's purpose can be difficult to determine because "legislation is frequently a congeries of different and sometimes conflicting purposes."[236] In their critique of the Court's use of purposive analysis in *United Steelworkers v. Weber*,[237] William Eskridge, Philip Frickey, and Elizabeth Garrett assert that the Court "oversimplified the statute's purpose and suppressed a possibly competing purpose. . . . Purposivism does not yield determinate answers when there is no neutral way to arbitrate among different purposes."[238] Furthermore, not all statutory purposes will be evident in a statute's text or its assembled legislative history.[239] Even expanding the interpretive inquiry to include legislative history as well as text threatens to mislead because not all purposes will be revealed in those materials. Judge Posner states that, because "public materials" such as

> the language of the statute, committee reports, and other conventional aids to interpretation . . . invariably seek to disguise rather than to flaunt the extent to which the real aim of the legislation is to advance the selfish interests of one group in the society, the process of statutory interpretation by judges tends to give legislation a more

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235 *See* George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 Nw. U. L. REV. 1557 (1996) (reviewing the history and political divisions surrounding the passage of the Administrative Procedure Act and showing that, despite a unanimous legislative vote in favor of the enacted law, the bill reflected substantial political divisions and compromise). For discussion of legislative "veto gates," see McNollgast, *Legislative Intent: The Use of Positive Political Theory in Statutory Interpretation*, 57 LAW & CONTEMP. PROBS. 3, 7 (1994).

236 William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 335 (1990). For a classic critique of purposive interpretation, see Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 878 (1930) ("[T]o interpret a law by its purposes requires the court to select one of a concatenated sequence of purposes, and this choice is to be determined by motives which are usually suppressed.").

237 443 U.S. 193 (1979).

238 WILLIAM N. ESKRIDGE, JR. ET AL., LEGISLATION AND STATUTORY INTERPRETATION 222 (2000).

239 In distilling the implications of public choice scholarship for statutory interpretation, Eskridge and Frickey state that

> [t]o speak of a statute's "purpose" is incoherent, unless one means the deal between rent-seeking groups and reelection-minded legislators. . . .
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> . . . Some statutes are little else but backroom deals. Judicial attempts to fancy up those deals with public-regarding rhetoric either are naive or simply substitute the judge's conception of public policy for that of the legislature. And when a court uses purposivist analysis to elaborate a statute, it may actually undo a deliberate and precisely calibrated deal worked out in the legislative process.

Eskridge & Frickey, *supra* note 236, at 334–35.

> public-spirited cast than the legislators actually intended. . . . The judges easily may overlook compromises, and thus impart greater thrust to a piece of legislation than the legislators agreed to.[240]

Compromise and multiplicity of purpose thus frequently limit the extent to which Congress actually agrees to further a particular legislative goal.

Despite these pervasive incentives for compromise, limiting language, logrolling, and multiple legislative purposes, some advocates of purposive interpretation argue that courts should resolve questions of statutory interpretation by construing the law to further some asserted primary purpose. John Manning and others refer to this form of purposive interpretation as "strong purposivism."[241] The idea that courts should further a statute's primary purpose was most widely accepted in the early to mid-twentieth century, when faith in the honorable intentions of politicians was perhaps at its height.[242] Courts in that period frequently accepted calls to read remedial legislation broadly or to look past a problematic text, like that in *Church of the Holy Trinity v. United States*,[243] by identifying a primary purpose to justify judicial disregard of a statute's most ordinary meaning.[244] Under this view, courts would, in effect, look to a statute for its most discernible general purpose and act in furtherance of that single overriding purpose. Recent scholarship embracing "equity of the statute" approaches to statutory interpretation has similarly embraced purposive interpretation, but relies on originalist arguments about judicial roles.[245]

This strong purposivism, especially the judicial search for a single, overarching legislative purpose and interpretive expansion of this single overriding purpose, has been much criticized. In a recent dissenting opinion, Justice Scalia captured the essence of this critique:

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240 RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 154 (1985).

241 *See* Manning, *supra* note 216, at 3 & n.3 ("I use 'strong purposivists' to identify those who rely on purpose to depart from a clear statutory text, rather than those who use it merely to clarify an ambiguous text.").

242 For a seminal discussion of the processes of purposive statutory interpretation, see HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1377–80 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (exploring means to discern the "general purpose" of a statute and suggesting rationale for such an interpretive goal).

243 143 U.S. 457, 458–59 (1892) (interpreting a federal statute appearing to prohibit alien labor of any kind as inapplicable to the church's hiring of an English cleric, explaining that "a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers"). For a critique of *Holy Trinity*, see Manning, *supra* note 216, at 14–16.

244 Justice Scalia finds this practice, especially as it occurred in *Holy Trinity*, to be indefensible. *See* Scalia, *supra* note 223, at 18–23. Justice Scalia pithily asserts that "the decision was wrong because it failed to follow the text." *Id.* at 22.

245 *See, e.g.*, Manning, *supra* note 216, at 22–27, 81–85. Manning's article responds in part to arguments advanced in William N. Eskridge, Jr., *Textualism, The Unknown Ideal?*, 96 MICH. L. REV. 1509 (1998) (reviewing SCALIA, *supra* note 223).

"Deduction from the 'broad purpose' of a statute begs the question if it is used to decide by what *means* (and hence to what *length)* Congress pursued that purpose."[246] John Manning articulates the concept that laws have limited scope in arguing that "legislation cannot be expected to pursue its purposes to their logical ends; accordingly, departing from a precise statutory text may do no more than disturb a carefully wrought legislative compromise."[247] Both Justice Scalia and Professor Manning argue in terms resembling those used by Judge Easterbrook in suggesting that statutes' limited "domains" should be respected by the courts.[248]

It is difficult to glean a single paramount purpose in any law. To reduce a complex piece of legislation to a single purpose flattens the law's nuances, compromises, and other purposes. It must be emphasized, however, that this Article rejects the normative claim that textualists assert as following, in part, from this critique of purposive interpretation. Textualists frequently leap to the "therefore" conclusion that text and only text should be consulted in statutory interpretation battles.[249] As this section discusses below, this Article embraces criticisms of purposive analysis. What is problematic, however, is any attempt by courts to arrogate to themselves sole interpretive power without recognizing the implications of the complexity of the legislative process and resulting legislation. In nonconstitutional statutory interpretation battles, recourse to materials beyond the text, with special attention to a statute's vertical history, remains appropriate. In any interpretive setting, a judicial interpretative method that seeks to distill each law to being about a single activity is problematic. The textualist jump to statutory analysis based only on review of statutory text can itself empower courts to exercise interpretive creativity by limiting the array of data that is considered.[250]

This Article, in contrast, makes the normative claim that the inevitable complexity of statutory law calls for courts to adopt deferential interpretive modes that acknowledge legislative complexity, multiple purposes, compromises, and blurred distinctions between targets and beneficiaries. Largely in response to the Supreme Court's clear call for a Commerce Clause test that retains a meaningful judicial check-

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246 Babbitt v. Sweet Home Chapter of Communities for a Great Or., 515 U.S. 687, 726 (1995) (Scalia, J., dissenting).

247 Manning, *supra* note 216, at 18.

248 *See* Easterbrook, *supra* note 217, *passim.*

249 *See* Strauss, *supra* note 227, at 243 (reviewing textualists' focus on text and arguing for attention to political history); *see also* Manning, *supra* note 216, at 15–22 (explaining textualists' rejection of recourse to nontextual materials to aid interpretation).

250 *See* Thomas W. Merrill, *Textualism and the Future of the* Chevron *Doctrine*, 72 WASH. U. L.Q. 351, 372–73 (1994) (explaining that textualists must become "more imaginative" with "fewer tools at [their] disposal").

ing role, this Article ultimately suggests a "legislativist approach" to Commerce Clause analysis that focuses on numerous textual elements.[251] The goal, however, is to ensure that courts interpret laws so as to acknowledge their complexities, compromises, and enactment dynamics. The peril in both statutory interpretation and Commerce Clause adjudication contexts lies in reducing a law to a single goal, purpose or dimension, not in going past the textual veneer of statutory language.

Nevertheless, legislative process insights, many derived from textualism, remain valuable in how they shed light on the problems inherent in the Court's recent recasting of Commerce Clause analysis. The Court's focus on a law as dealing with only a single relevant activity, and its insistence that the only relevant question is whether the target's regulated conduct is itself commercial, reflects an inappropriately flattened view of legislation that suffers from the same errors inherent in the search for a single legislative purpose. Both approaches are reductionist in their methodology, parsing legislative texts and drawing from that analysis conclusions about a single allegedly relevant activity (in the commerce arena) or a single relevant purpose (in debates over statutory meaning). Laws have purposes, not a purpose, and tend to be motivated by and have as their goals multiple activities and related effects. The Court's unidimensional Commerce Clause approach is difficult to square with the realities of legislation, which are well described in critiques of purposive statutory interpretation.

2. *The Blurred Line Between Legislative Targets and Beneficiaries*

In *Lopez* and *Morrison*, the Court appeared to develop a "target" oriented perspective on the Commerce Clause analysis of challenged laws.[252] As the above critique of purposive modes of statutory interpretation suggests, limiting judicial analysis to the search for a prime target or beneficiary of regulation is also inappropriate. In a world of compromise and logrolling, a target of regulation—in the sense of the newly constrained entity—may also be the beneficiary of regulatory approaches selected. For example, regulation may prohibit or constrain some target behavior, but may also create barriers to entry of new competitors, adopt standards favorable to targets as compared with other proposed standards, or create more predictable market and political conditions.

The acknowledgment of a blurred line between targets and beneficiaries is substantially rooted in early law and economics literature.

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251 *See infra* Part V.

252 *See supra* notes 110–32 and accompanying text. The *SWANCC* decision, on the other hand, seemed to focus more on the beneficiaries of regulation—wetlands and migratory birds. *See supra* notes 147–63 and accompanying text.

The ostensible targets of a regulation are in most cases at least partial beneficiaries as well, even in the rare case of a statute that has a clear primary purpose. Moreover, apparent beneficiaries of regulation may actually be partial losers. Economist George Stigler suggested in 1971 that "as a rule, regulation is acquired by the industry and is designed and operated primarily for its benefit."[253] He acknowledged that some regulation may be onerous for a target industry (point *T* in our regulatory prism conception), but suggested that even such onerous regulations will tend to create benefits such as subsidies, control over entry by rivals, or profit-enhancing price stability.[254] Thus, the ostensible targets of regulation often are also partial beneficiaries, facing regulatory constraints, but also typically emerging with benefits that may be among the legislature's chief goals.

The soundness of Stigler's insight that beneficiaries and targets will be difficult to distinguish is easily seen in several areas of legislation thought to operate at the fringe of federal commerce power. In abortion clinic access legislation, for example, the apparent beneficiaries may be viewed as the clinics, doctors, or patients seeking access. In actuality, however, the Freedom of Access to Clinic Entrances Act (FACE) also provides protection for the right of opponents of abortion to engage in protest, by making clear that the law prohibits only efforts to prevent clinic access.[255] Indeed, the statute states explicitly that it does not reach expressive conduct protected by the First Amendment.[256] Moreover, colloquy on the floor of the Senate made clear that the bill was intended to provide broad safeguards for nonvi-

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253 George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 3 (1971), *reprinted in* GEORGE J. STIGLER, THE CITIZEN AND THE STATE 114 (1975). Stigler's theory of economic regulation has been challenged on a number of grounds. *See* Roger G. Noll, *Economic Perspectives on the Politics of Regulation*, *in* 2 HANDBOOK OF INDUSTRIAL ORGANIZATION 1254–87 (Richard Schmalensee & Robert D. Willig eds., 1989) (positing that Stigler's theory of monopoly capture by regulated interests occurs only in extreme cases and that Stigler's theory overemphasizes the ability of politicians to control agencies); CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE 47–73 (1990) (arguing that regulation occurs for a variety of reasons beyond Stigler's theory of interest group transfer); Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. ECON. 371, 372–73 (1983) (asserting that regulators have larger constituencies extending beyond the scope of directly regulated interests); John J. Binder, *Measuring the Effects of Regulation with Stock Price Data*, 16 RAND J. ECON. 167, at 181–82 (1985) (empirically challenging regulatory acquisition theory in finding no systematic increased industry wealth flowing from regulatory changes, but also noting the difficulty of discerning when regulatory change events will be noted in the market); Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, *passim* (1998) (arguing that Stigler's public choice theory of regulation puts excessive weight on legislators' electoral goals and that it is inconsistent in its treatment of principal-agent and collective action problems between regulators, the regulated, legislators and voters).

254 *See* Stigler, *supra* note 253, at 4–6.

255 *See* 18 U.S.C. § 248(a) (2000).

256 *See id.* § 248(d)(1); 140 CONG. REC. H3126 (daily ed. May 5, 1994) (statement of Rep. Schumer) (noting that the bill was drafted more narrowly than the injunction re-

olent protest.[257] Patients confronted by yelling protestors are unlikely to consider themselves beneficiaries of a law providing protestors such rights, while protestors are similarly likely to consider themselves losers under the law. In addition, the statute also applies to violent protests at facilities that counsel women *not* to have abortions.[258] FACE's statutory scheme thus creates groups that are simultaneously targets and beneficiaries.[259] The law creates a version of ritualized political protest rendering difficult the identification of targets and beneficiaries.[260] Medical care providers and local police are perhaps also regulatory beneficiaries of a more stable political and market environment. They too, however, are probably only partial victors in the political process. These types of entities might be more akin to the fanning spectrum of color effects emanating from the "regulatory prism" suggested in Part I. The many compromises evident in this law reflect politicians carefully tiptoeing around a politically charged issue.

Laws protecting wetlands and endangered species similarly create a variety of targets and beneficiaries that, if analyzed from only a single perspective, might or might not justify federal regulation. Wetlands protection, for example, could be seen as targeting or serving primarily the goal of protecting vulnerable wetlands and related ecosystems, but it might also be understood to target entities that threaten to destroy wetlands or their biological integrity.[261] True to

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viewed by the U.S. Supreme Court in *Madsen v. Women's Health Center*, 512 U.S. 753 (1994)).

257 *See* 139 CONG. REC. S15672 (daily ed. Nov. 16, 1993) (statements of Sen. Mikulski and Sen. Feinstein) (clarifying that the bill "is so narrowly drawn and therefore would allow both first amendment, literally first amendment rights, but also the figurative first amendment rights which is the nonviolent protest").

258 *See* 18 U.S.C. § 248(e)(5) (defining reproductive health services to include "counseling or referral services relating to the human reproductive system"); H.R. REP. No. 103-488, at 13 (1994) ("[F]acilities that do not offer abortions or other reproductive health care, but offer only counseling about alternatives to abortion, are included [in the scope of the proposed Act].").

259 *See* 139 CONG. REC. H10087 (daily ed. Nov. 18, 1993) (statement of Rep. Collins) ("[The bill] has a double thrust: It protects peaceful demonstration and the right to choose your doctor without fear of violence."); 139 CONG. REC. S15681 (daily ed. Nov. 16, 1993) (statement of Sen. Gorton) ("This bill achieves a balance between two diametrically opposed points of view.").

260 *See* 139 CONG. REC. S15677 (daily ed. Nov. 16, 1993) (statement of Sen. Wofford) ("[T]his legislation should serve as a rule of reason to persuade people on all sides of this deep controversy not to move beyond peaceful protest and truly civil disobedience, over the threshold into physical obstruction, intimidation and violence."); 139 CONG. REC. S15686 (daily ed. Nov. 16, 1993) (statement of Sen. Durenberger) ("In its earlier versions, the case could be made that this bill took sides in that controversy, but the bill . . . today does not. I view this bill as an attempt hy the Congress and the Nation to endorse an old-fashioned notion . . . of civility in our national debates.").

261 The Clean Water Act's statutory declaration of goals and policy focuses both on the benefits of the legislation, such as "restor[ing] and maintain[ing] the chemical, physical,

Stigler's observation, other provisions give some potential regulatory targets a near complete break from regulation.[262] Similarly, the stated purpose of endangered species law is the protection of endangered species, but the law incorporates broad statutory exclusions.[263] In both bodies of law, one can identify other more distinct but still predictable beneficiaries, such as hunters and fishers, the tourist trade, and ecologists and biologists. If one focuses only upon the immediate regulatory beneficiary—that is, the thing or activity directly protected, for example a wetlands or endangered species—a Commerce Clause justification would require several leaps of logic to establish both commercial and interstate repercussions. Considered from a different perspective, however, people interested in hunting, hiking, research, and eco-tourism clearly provide a basis for finding substantial links to interstate commerce.

A focus on the target of these laws—in the sense of the likely agent of harm—easily satisfies Commerce Clause scrutiny. Real estate and land development may historically be subject to local regulation, but in an era of bank consolidations, bundled derivative marketing interests in developments, national and international insurers, and with tax incentives often encouraging particular forms of development, these are commercial enterprises imbued with many interstate commercial links.[264] Unless the Court is en route to reviving subject matter limitations on the federal government, as others have suggested,[265] the mere fact that states have historically regulated land de-

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and biological integrity of the Nation's waters," 33 U.S.C. § 1251(a) (2000), and providing for "the protection and propagation of fish, shellfish, and wildlife," *id.* § 1251(a)(2), and on the agents of harm to national waters, *id.* § 1251(a)(3) ("[I]t is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited."). One of the statute's key enforcement provisions focuses on regulating particular activities, namely, the "discharge of dredged or fill materials into . . . navigable waters," *see id.* § 1344(a), but also links regulatory power to particular environmental beneficiaries. The statute authorizes regulation prohibiting disposal of such materials in cases in which it would have an "unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas." *See id.* § 1344(c).

262 *See id.* § 1344(f) (excluding, inter alia, farming and other agricultural operations from regulatory control under § 1344).

263 *See, e.g.*, 16 U.S.C. § 1536 (2000) (establishing a regulatory consultation process to authorize potentially harmful activity under an "incidental taking" provision); *see also infra* notes 267–70 (discussing other ESA safety valves).

264 *See* Grant S. Nelson, *A Commerce Clause Standard for the New Millennium: "Yes" to Broad Congressional Control over Commercial Transactions; "No" to Federal Legislation on Social and Cultural Issues*, 55 ARK. L. REV. 1213, 1228–31 (2003) (discussing ways that the real estate business is imbued with commerce).

265 Some commentators have suggested that the Court's recent federalism cases herald a return to the notion that some areas of traditional state functions lie beyond federal legislative power. *See, e.g.*, Lessig, *supra* note 9, at 205–06. Ten years before *Lopez*, the Court repudiated the doctrine that Congress's Commerce Clause authority does not extend to the regulation of traditional state functions. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 530–31 (1985), *overruling* Nat'l League of Cities v. Usery, 426

velopment should not be viewed as disabling federal legislative action in situations where commercial activity, harms, or effects justify exercise of the commerce power.[266]

Even the ostensible targets of these laws, such as real estate developers likely to cause harms proscribed by the statutes, are also partial beneficiaries. Wetlands are not absolutely protected, but subject to smaller scale intrusions permitted by statutorily authorized general permits and also allowed if a development can be shown to be water dependent and without viable alternatives.[267] Similarly, endangered species harms are authorized if caused pursuant to an "incidental take permit,"[268] an approved habitat conservation plan,[269] or an exemption granted by the Endangered Species Committee under statutory approval criteria.[270] ESA provisions require "critical habitat" designations that are supposed to accompany listing of endangered species to take into account the benefits and costs, including the economic impact, of such designations.[271] Procedural hurdles and constraints further limit the ability of the government and environmentalist groups to block "target" activities regulated under the statutes.[272]

U.S. 833 (1976). Nonetheless, respect for state functions soon returned in the guise of a clear statement rule. *See* Gregory v. Ashcroft, 501 U.S. 452, 460–61 (1991); Ann Althouse, *Enforcing Federalism After* United States v. Lopez, 38 ARIZ. L. REV. 793, 809 (1996) (characterizing *Gregory* as a "reviv[al]" of "[j]udicial solicitude for traditional state functions"); William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 623–25 (1992) (asserting that *Gregory* "seems to have revived *National League of Cities*, at least as a new super-strong rule of statutory interpretation").

266 As discussed below, the Court in *SWANCC*, 531 U.S. 159, 173–74 (2001), explicitly indicated that the tradition of state authority over land and water use informed in part its conclusion that the Army Corps of Engineers had exceeded its statutory grant of authority. *See infra* note 277. Justice Stevens, in contrast, asserted that the statutory provisions at issue were yet another example of federal pollution-control leadership. *See id.* at 191 (Stevens, J., dissenting).

267 *See* 33 U.S.C. §§ 1343(c), 1344(b), (e).

268 *See* 16 U.S.C. § 1536(b)(3)–(4) (providing authorization under certain circumstances for regulatory approval of agency action involving only "incidental taking" of a protected species).

269 *See id.* § 1539(a) (authorizing approval of incidental takings of endangered species if the permit applicant has created a conservation plan to minimize harm to endangered species); *see also id.* § 1539(b) (providing for "hardship" exemptions to the permitting requirements of § 1539(a)).

270 *See id.* § 1536(e)–(h); *see also, e.g., id.* § 1536(h)(1)(A)(ii) (authorizing exemptions in cases in which the Endangered Species Committee finds that an applicant meets the statutory conditions, including a showing that "the benefits of such action clearly outweigh the benefits of alternative courses of action").

271 *See id.* § 1533(b)(2) (stating that critical habitat designations shall "tak[e] into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat" and authorizing exclusion of areas if the "benefits of . . . exclusion outweigh the benefits" of designation, unless exclusion will "result in extinction of the species concerned").

272 In particular, the regulatory listing process for endangered species under the ESA, *see id.* § 1533(a)(1)–(2), has produced substantial delay and litigation because of the high

A particularly notable example of laws that both target harm and create benefits for the ostensible target can be seen in the context of tobacco regulation. As the Supreme Court discussed in *FDA v. Brown & Williamson Tobacco Corp.*, since 1938, Congress has repeatedly regulated aspects of tobacco production, use, and sales.[273] As construed by the Court, Congress's piecemeal legislative regulation of tobacco also collectively denied the Food and Drug Administration (FDA) the authority to regulate cigarettes and other tobacco products.[274]

These examples of statutory safety valves and limited protections reveal that, even beyond the scope of industry specific laws contemplated by Stigler, regulatory frameworks provide a mix of partial winners and losers that often evade clear identification. Similarly, judicial characterization of a law as having a particular purpose or subject-matter domain (such as the *SWANCC* Court's assertion that wetlands protection implicated land use regulation, not environmental protection[275]) is indeterminate and manipulable. Laws can frequently be characterized as serving multiple purposes or bridging several subject-matter domains. The Court often refuses to distill laws to a single purpose.[276] In the federalism area, however, the Court, since *Lopez*, appears inclined to reduce each law's complexity and identify a single relevant activity or subject area, rather than acknowledge other subject areas implicated by the law.[277]

The Court's recent unidimensional inquiry, which attempts to identify a single, relevant Commerce Clause "activity," ignores the inherent complexities of statutory law and the legislative process. All four areas of law discussed in this Article—abortion clinic access, wet-

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stakes of listing and the opportunities for stakeholders to create delay. *See* Amy Whritenour Ando, *Waiting to Be Protected Under the Endangered Species Act: The Political Economy of Regulatory Delay*, 42 J.L. & ECON. 29, *passim* (1999); Barton H. Thompson, Jr., *The Endangered Species Act: A Case Study in Takings and Incentives*, 49 STAN. L. REV. 305, 313, 317–21 (1997).

273 529 U.S. 120, 143–159 (2000).

274 *See id.* at 159–161. For a critique of the Court's approach to statutory interpretation in *Brown & Williamson*, see Buzbee, *One-Congress Fiction*, *supra* note 1, at 194–200.

275 *See* 531 U.S. 159, 166–67 (2001).

276 *See supra* Part III.A.1.

277 *SWANCC* is particularly notable for its disputed finding that wetlands protection is a form of land use regulation, an area traditionally regulated by the states. *See* 531 U.S. at 166–67, 173–74. Despite the Court's strong language, there are equally compelling, alternate characterizations of the law at issue in *SWANCC*. For instance, Justice Stevens's dissent noted that wetlands protection, viewed in its historical context, is part of the larger trend of innovations in federal environmental law that commenced in the late 1960s. *See id.* at 174–81 (Stevens, J., dissenting). Moreover, wetlands protection is linked to migratory bird protections under international treaties, other federal laws, traditional federal regulation of navigation, and constraints on degradation of rivers and ocean waters. *See* FRANK P. GRAD & JOEL A. MINTZ, ENVIRONMENTAL LAW 382–95 (4th ed. 2000) (discussing the modern Clean Water Act as derived in part from federal statutory law, such as the federal Rivers and Harbors Act of 1899, 33 U.S.C. § 401).

lands and endangered species protection, and tobacco regulation—present serious challenges to any analysis that attempts to discern targets and beneficiaries, let alone identify motivation behind these laws. Compromises reflected in these laws and their direct and indirect effects render difficult any such exercise. Furthermore, the more a law relies upon new techniques to regulate a harm or create a protection, the less it even fits into judicially defined categories of regulation. Identifying the relevant actors in the regulatory prism tends to be easy, but determining their status as targets and beneficiaries is more challenging. Similarly, no principled basis guides a court seeking to discern a particular "activity," harm, or effect that should be the focus of Commerce Clause analysis. One may appropriately identify relevant purposes, effects, and activities, but seldom a unitary legislative end.

Singling out a particular activity requires a commitment to a certain baseline. Only against such a fixed (albeit usually unacknowledged) background can the Court identify a single activity as the rupture in the natural order that demands close constitutional scrutiny. As discussed earlier in this Article, the Court appears to rely on common law benchmarks to characterize the relevant activity.[278] In *SWANCC*, for example, the Court characterized the challenged provision as a regulation of "land use."[279] The Court's brief and elusive discussion on this point defies precise analysis, but the Court appeared to assume the perspective of a landowner who would, under traditional common law notions, enjoy broad discretion over development decisions. From the common law perspective, the landowner could be considered a "target" of the regulation. Viewed more broadly, however, the landowner might benefit from substantive or procedural protections embodied in the statutory regime. Recent debates about statutory interpretation make clear that the relevant activity for Commerce Clause purposes is not self-defining.[280] A statute does not emerge from the legislature with unitary targets, beneficiaries, effects, or motives. Those designations are the work of the Court, not the legislature. Such singular perspectives are not *discovered* by the Courts, they are judicial constructs. The designation of a particular perspective inevitably requires a choice. The post-*Lopez* Court has neither provided an account of that choice, nor, more importantly, has it justified why the Court, rather than Congress, gets to make the choice.

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278 *See infra* Part IV.D.

279 *See* 531 U.S. at 173–74.

280 *See supra* Part III.A.1 (exploring how finding a single purpose behind a law is problematic).

3. *Judicial Incompetence to Glean a Single Relevant "Activity"*

The Supreme Court's recent Commerce Clause cases reveal a Court searching for a single relevant commerce-linked activity for each challenged law. How the Court decides which activity is constitutionally relevant, however, is far from clear. As explained earlier in this Article, statutes tend to be motivated and influenced by an array of interests and to reflect compromise and ambiguity.[281] By shaping the rights and duties of people and entities in some respect touched by an area of legislation, all law "regulates" both by influencing what conduct is permissible and by influencing the degree of freedom or protection offered by the regulatory intervention.[282] The Court nevertheless has yet to assess self-critically whether it is capable of identifying, in a principled manner, the single, relevant commerce-linked activity in a given case. The Court's search for a single relevant activity resembles techniques of statutory interpretation under which courts select a general statutory purpose and resolve difficult interpretive issues by reference to that general purpose.[283] Part III.A explained why the search for a single purpose, a single activity, or a unidimensional legislative focus is inappropriate in light of the more complex reality reflected in the conceptual framework of the regulatory prism.

A second prong of criticism of purposive interpretation (and, typically, praise for textualist modes of interpretation) hinges on judicial inability to make highly discretionary, interpretive judgments without judges seeking to further their personal politics and preferences. Criticisms of "dynamic" statutory interpretation, and a related debate engendered by Jonathan Macey, reveal the perils of a Commerce Clause jurisprudence in which judges pick only one relevant "activity" to determine if a law passes constitutional muster.

William Eskridge's advocacy of "dynamic statutory interpretation" hinges on the ability of judges to discern contemporary views of previously enacted laws and to resolve interpretive debates by updating statutes to reflect contemporary understandings.[284] Eskridge argues that judges should interpret a disputed statutory clause in part according to "what it ought to mean in terms of the needs and goals of our present day society."[285] Justice Scalia emphatically criticizes this ap-

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281 *See supra* Part III.A.1–2.

282 *Cf.* Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913) (emphasizing the relational nature of legal rights). Hohfeld states that allocating rights to one party necessarily creates duties that burden another party. *See id.* at 30–31. Moreover, as legal realist thinkers have emphasized, the allocation of rights and duties among parties reflects an exercise of state power, often embodied in the common law. *See* Balkin, *supra* note 18, at 1123–25.

283 *See supra* Part III.A.1.

284 *See* WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 48–80 (1994).

285 *Id.* at 50.

proach, arguing that "[i]t is simply not compatible with democratic theory that laws mean whatever they ought to mean, and that unelected judges decide what that is."[286] John Copeland Nagle also questions the appropriateness of dynamic statutory interpretation, asserting that a judicial inquiry into contemporary legislative preferences and social needs is too indeterminate and unfaithful to democratic theory and to the rule of law.[287]

Responding to Judge Easterbrook's call for courts to construe legislation as contract and to enforce the interest group bargains actually encapsulated in legislation,[288] Jonathan Macey supports a more discerning mode of judicial review that would enforce only the public-regarding motives driving legislative action.[289] In Macey's view, most legislation is a product of interest group bargains that, at best, incompletely reflect or further public interests.[290] Political rent-seeking is the norm. Interest groups use government lobbying and other methods to exert pressure on the legislature and further their private interests, though laws will typically contain at least a declared public-regarding purpose.[291] Macey's proposed cure is that judges should act as "filters through which public-regarding legislation passes undisturbed, while rent-seeking legislation is cast aside."[292] This argument, however, assumes that judges can distinguish which purposes are public-regarding and which derive from unsavory, special interest motives.[293]

Macey's proposal, like Eskridge's dynamic statutory interpretation idea, provoked criticism rooted in concerns that judges would be given excessive interpretive discretion. Despite the Macey proposal's ostensible public-regarding purpose, Jerry Mashaw has condemned it as "judicial activism of a quite swashbuckling variety."[294] These criticisms mirror arguments by Justice Scalia and others that reliance on

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286 Scalia, *supra* note 223, at 22.

287 John C. Nagle, *Newt Gingrich, Dynamic Statutory Interpreter*, 143 U. PA. L. REV. 2209, 2221, 2237 (1995) (reviewing ESKRIDGE, *supra* note 284) (observing that "[t]he sources from which a dynamic statutory interpreter may seek evidence of statutory meaning are limited only by the interpreter's imagination").

288 *See supra* notes 217–20 and accompanying text.

289 *See* Macey, *supra* note 217, at 225–27.

290 *See id.* at 230.

291 *See id.* at 203–31.

292 *Id.* at 228–29 (footnote omitted).

293 Macey's proposal stands in contrast to Judge Easterbrook's call for judicial enforcement of the exact legislative bargain, regardless of the interests served. *See supra* notes 217–20 and accompanying text. Ironically, Macey questions the ability of courts to discern the difference between "public interest statutes [and] special interest statutes," Macey, *supra* note 217, at 239, suggesting that judges "are not investigative reporters," *id.*

294 Jerry L. Mashaw, *The Economics of Politics and the Understanding of Public Law*, 65 CHI.-KENT. L. REV. 123, 153 (1989); *see also* Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 48–66 (1991) (providing a more general criticism of "efforts to use interest group theory to justify more intrusive judicial review").

legislative history creates dangers of excessive judicial latitude and judicial policy making.[295]

The Supreme Court exercises a similarly political and judgment-laden power when it selects a single, constitutionally relevant "activity" for purposes of its Commerce Clause analysis. In any piece of legislation, there are always numerous potential activities to consider. Chief among them are the four basic attributes underlying legislation in the regulatory prism construct: the political impetus for legislation, the targets of the legislation, the beneficiaries of the legislation, and the broader effects of the legislation.[296] The Court's recent unidimensional approach to Commerce Clause analysis is as vulnerable to abuse as the interpretive methods proposed by Eskridge and Macey in the realm of statutory interpretation.

B. Statutory Construction and Constitutional Adjudication

The scholarship discussed in Part III.A.3 focuses on statutory construction, not constitutional interpretation. Interpreting the Constitution differs in important ways from interpreting ordinary legislative output. These significant theoretical distinctions, however, do not undermine the relevance of the debates on statutory construction to this Article's analysis of contemporary Commerce Clause jurisprudence. Indeed, in crucial respects, the constitutional context of our analysis heightens concerns about judicial legitimacy.

1. *Faithful Agents of the People*

In construing statutes, courts generally try to act as the faithful agents of the legislature.[297] Analysis of the legislative process, however, demonstrates the difficulty of that task. In particular, the complexities of the legislative process undermine any attempt to interpret a statute by reference to a unitary purpose, activity, target, or beneficiary.[298] In construing the Constitution, courts generally attempt to act as faithful agents of the people and to restrain the legislature when necessary. The goal of constitutional judicial review is not to determine the will of the legislature, but to prevent that body from transgressing the principles embodied in the Constitution. The ultimate constitutional question is not, for instance, whether Congress intended to prohibit development of wetlands, but whether the Constitution grants Congress the power to exert regulatory authority over such activity at all.

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295 *See, e.g.*, Scalia, *supra* note 223, at 35–37.

296 *See supra* Part I.

297 *See, e.g.*, Manning, *supra* note 216, at 5 & n.11.

298 *See supra* Part III.A.

To answer that ultimate constitutional question, though, the court necessarily engages in statutory interpretation. The constitutionality of the statute turns on its connection to Congress's power to "regulate Commerce . . . among the several States."[299] Analysis of the statute's text and its effects stands as an essential aspect of a Commerce Clause inquiry. Explorations of the legislative process demonstrate the complexity of this interpretive task. The normative implications of some scholarship should not cloud the overarching descriptive message. Some commentators focus on legislators' supposed hidden agendas and self-serving motives.[300] However, whatever the motives of legislators, it is the legislative process that gives rise to multiple, overlapping agendas. It is not the duplicity of legislators, but the multidimensional nature of legislative processes and resulting legislation that renders impossible the identification of singular motives, activities, targets, or beneficiaries.[301] Contemporary congressional enactments have manifold and variegated effects. These effects have important consequences for both statutory and constitutional interpretation. Such dual implications inevitably follow from the nature of Commerce Clause jurisprudence. As the constitutional inquiry turns on analysis of the legislation, the intricate network of legislative effects shapes the constitutional determination. The regulatory prism reveals the inadequacy of a unidimensional approach to statutory or constitutional interpretation.

Indeed, in one key respect, the risks of the Supreme Court's recent unidimensional Commerce Clause analysis are far greater than the risks in the statutory interpretation field. In construing a statute, a court must make some choice among possible interpretive strategies. The court has no alternative but to engage in the process of applying the law. Mistakes are possible, but the court seeks to implement the legislative command. In the Commerce Clause context, the Court threatens to take a more devastating step than mere misguided analysis of a statutory provision. In this constitutional setting, the Court has used its unidimensional and judgment-laden selection of a single relevant activity to invalidate in their entirety democratic assertions of federal legislative power.[302] The only justification is judicial certitude that the Supreme Court, in the interest of preserving a particular balance of federal and state authority, can select the correct activity for the Commerce Clause analysis and, in turn, limit the reach of federal legislative power. One need not unduly exalt the "counter-

299 U.S. CONST. art. I, § 8, cl. 3.

300 *See, e.g.*, MCCHESNEY, *supra* note 24.

301 *See* Shepsle, *supra* note 217, at 241–50.

302 *See supra* Part II.D.

majoritarian difficulty"[303] to note that such judgments displace current democratic output to a greater extent than decisions construing statutes.[304]

2. *Purpose in Constitutional Adjudication*

This Part does not focus on the search for legislative purpose in constitutional adjudication. As discussed earlier in this Article, the flaws in the Court's Commerce Clause approach stem not from a reductionist quest for a legislative purpose, but from a different, albeit related, reductionism: a unidimensional approach in designating a single relevant activity as the subject of Commerce Clause scrutiny.[305] A brief consideration of purpose in constitutional analysis, however, highlights the problematic character of statutory interpretation techniques that require ascription of a unitary statutory purpose. In constitutional interpretation, the notion of legislative purpose has remained relatively unaffected by the critical barrage deployed against the concept in the statutory interpretation debates. The differing fates of purpose in the constitutional and statutory contexts reflect important distinctions in how the concept functions in the two realms.

Purpose remains a central concept in constitutional theory. In a variety of areas, ranging from equal protection to free speech to free exercise of religion, the constitutionality of legislation often hinges on determinations of legislative purpose.[306] Indeed, scholars have suggested that inquiries into purpose are playing an increasingly important role in constitutional adjudication.[307] Judges clearly understand the pitfalls of relying on legislative purpose,[308] yet purpose tests abound.

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303 *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16 (1962). Barry Friedman has provided a thorough, insightful intellectual history of the counter-majoritarian difficulty. *See generally* Barry Friedman, *The History of the Countermajoritarian Difficulty* (pts. 1, 3–5), 73 N.Y.U. L. REV. 333 (1998), 76 N.Y.U. L. REV. 1383 (2001), 148 U. PA. L. REV. 971 (2000), 112 YALE L.J. 153 (2002).

304 The Court's Commerce Clause approach is arguably even more vulnerable to politicized judicial abuse than are the Eskridge and Macey models of statutory interpretation. Unlike dynamic statutory interpretation and judicial downplaying of interest-group influences on legislation, the Court's approach is not even justifiable by reference to some public-regarding ends.

305 *See supra* Parts II.D, III.A.3.

306 *See* Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 CAL. L. REV. 297, 312–18 (1997); Richard H. Fallon, Jr., *Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 71–73 (1997).

307 *See, e.g.*, Bhagwat, *supra* note 306, at 312; Fallon, *supra* note 306, at 90–91; *see also* Edward T. Swaine, *Negotiating Federalism: State Bargaining and the Dormant Treaty Power*, 49 DUKE L.J. 1127, 1258 (2000) ("Tests turning on legislative motivation are in vogue . . . .").

308 *See, e.g.*, Kassel v. Consol. Freightways Corp. of Del., 450 U.S. 662, 702–03 (1981) (Rehnquist, J., dissenting) (criticizing the view that the "Court should consider only *the* purpose the . . . legislators *actually* sought to achieve" in enacting the challenged statute); Palmer v. Thompson, 403 U.S. 217, 224 (1971) (noting that "it is extremely difficult for a

Scholars cite several reasons for the persistence of purpose analysis in constitutional law, including relative judicial competence to assess ends rather than means,[309] the importance of purpose in establishing social meaning,[310] and the ability of purpose analysis to mediate among competing jurisprudential theories.[311] In short, purpose tests can serve important functions, and in many situations are better than any alternatives. For present purposes, though, we wish to highlight a specific feature of constitutional purpose analyses: they generally do not deny the existence of plural purposes. Constitutional purpose tests usually acknowledge the multiple dimensions of legislation, and courts have devised frameworks for addressing that multiplicity.

In its deferential mode, as when applying rational basis review under the Due Process and Equal Protection Clauses, the Court notes the variety of potential legislative purposes and simply asks if any possible purpose is legitimate and whether the challenged enactment is rationally related to advancing this legitimate goal.[312] Here, the Court's acknowledgment of the broad range of potential legislative purposes, along with an expansive sense of legitimate government aims, grants substantial deference to legislative choices.[313] This kind of deferential due process review served as a model for the deferential Commerce Clause approach that the Court adopted in *Wickard v. Fil-*

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court to ascertain the motivation, or collection of different motivations, that lie behind a legislative enactment" (citing United States v. O'Brien, 391 U.S. 367, 383, 384 (1968))).

309 *See* Bhagwat, *supra* note 306, at 321–23; Richard H. Pildes, *Avoiding Balancing: The Role of Exclusionary Reasons in Constitutional Law*, 45 HASTINGS L.J. 711, 729 n.45 (1994) ("[J]udicial review of legislative justifications and motives might well be the task judges are *most* well positioned to perform."); *see also* Swaine, *supra* note 307, at 1258 (noting that purpose tests are attractive "because they are thought to be more amenable to judicial administration").

310 *See* Richard H. Pildes, *Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 J. LEGAL STUD. 725, 753 (1998) ("For constitutional and other purposes, it is a mistake to treat an action as independent from the reasons behind it, for those reasons give actions their distinct social meanings."); *see also* Fallon, *supra* note 306, at 98 ("[W]e often cannot even characterize an act without understanding what motivated it."); Charles Fried, *Types*, 14 CONST. COMMENT. 55, 64 (1997) ("The limits the Constitution places on government may be understood not just in terms of minimizing certain sorts of harms, but in ruling certain goals out of bounds for government altogether.").

311 *See* Fallon, *supra* note 306, at 100 ("[W]ith few exceptions, the purposes that are held forbidden tend to reflect an overlap of, or consensus among, otherwise competing constitutional theories." (footnote omitted)).

312 *See, e.g.*, United States R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 179 (1980) ("Where, as here, there are plausible reasons for Congress' action, our inquiry is at an end. It is, of course, 'constitutionally irrelevant whether this reasoning in fact underlay the legislative decision,' because this Court has never insisted that a legislative body articulate its reasons for enacting a statute." (citation omitted) (quoting Flemming v. Nestor, 363 U.S. 603, 612 (1960))).

313 *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-3, at 1443 (2d ed. 1988) ("Often only the Court's imagination has limited the allowable purposes ascribed to government.").

burn.[314] With regard to both the Commerce Clause and the Due Process Clause, the New Deal Court afforded Congress broad latitude in setting national policy.[315] In the Commerce Clause domain, that deference appears to have dissipated substantially since 1995, replaced by a more aggressive unidimensional review.

In adjudicating claims under the Equal Protection Clause of discrimination against suspect classifications, the Court searches for forbidden purposes.[316] Again, the Court presumes a multiplicity of potential legislative purposes, but in this context inquires whether a prohibited purpose was among them. The Court does not ignore the problem of ascertaining the relevance of potential purposes and has developed a variety of doctrines to deal with the issue of multiple motivations.[317] The Court, thus, has acknowledged the complexity of the purpose inquiry and has tried to design tools to manage the difficulties. Although the doctrinal niceties of constitutional purpose analysis are beyond the scope of this Article, it is instructive that a major reason for the Court's concern with purpose, as opposed to mere effects, is that application of an effects-based test would represent a significant intrusion into the sphere of legislative prerogative.[318] In contrast, a carefully constructed purpose analysis seeks to protect legislative discretion.[319] The constitutional purpose analysis that the Court has developed avoids the arbitrary and aggrandizing characteristics of the Court's new Commerce Clause jurisprudence. It

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314 317 U.S. 111 (1942).

315 *See* CUSHMAN, *supra* note 70, at 220–21 (noting that Justice Jackson contemplated that *Wickard* would institute deferential rational basis review in the Commerce Clause context on the deferential model of due process review set forth in *United States v. Carolene Products Co.*, 304 U.S. 144 (1938)).

316 *See* Pildes, *supra* note 309, *passim* (developing the concept of "'excluded reasons' that cannot be the justification for government action" under constitutional jurisprudence); *id.* at 745–49 (applying this conception in the context of the Court's Equal Protection jurisprudence).

317 *See, e.g.*, Pers. Adm'r v. Feeney, 442 U.S. 256, 279 (1979) ("Discriminatory purpose . . . implies . . . that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part because of, not merely in spite of, its adverse effects upon an identifiable group." (internal quotation marks omitted)); Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 270 n.21 (1977). As the Court in *Arlington Heights* noted,

> Proof that the decision by the Village was motivated in part by a racially discriminatory purpose would not necessarily have required invalidation of the challenged decision. Such proof would, however, have shifted to the Village the burden of establishing that the same decision would have resulted even had the impermissible purpose not been considered.

429 U.S. at 270 n.21; *see also* Miller v. Johnson, 515 U.S. 900, 916 (1995) ("The plaintiff's burden is to show . . . that race was the predominant factor motivating the legislature's decision . . . .").

318 *See* Fallon, *supra* note 306, at 85–86.

319 Indeed, some commentators have argued that the doctrinal emphasis on discriminatory purpose affords too much deference to governmental actors. *See, e.g.*, TRIBE, *supra* note 313, § 16-20, at 1509.

is in the Commerce Clause arena that the Court manifests the kind of reductionist approach to legislation criticized in recent scholarship on statutory interpretation.[320]

IV
ATAVISTIC FEDERALISM, INDETERMINATE TESTS, AND AN ANTIREGULATORY AGENDA

In its recent Commerce Clause cases, the Rehnquist Court's five-Justice majority[321] has revived a categorical approach to constitutional challenges last seen in the Court's pre-1937 Commerce Clause jurisprudence.[322] Much as pre-1937 distinctions among "manufacture," "commerce" and "affected with a public interest" were usually determinative of constitutional challenges, the Rehnquist Court, as Part II.D discussed, now has indicated that the economic versus non-economic activity distinction is crucial, if not determinative. The Court has not, however, acknowledged that the perspective it adopts in assessing Commerce Clause challenges is usually the key interpretive move informing its decisions. Part of the New Deal Court's rejection of its pre-1937 jurisprudence rested on the Court's realization that it lacked a principled basis for determining the categorical distinctions that underlay its second guessing of congressional action.[323]

The Rehnquist Court has revived an overlapping jurisprudence of categories by (1) exclusively applying a three-part framework, (2) attempting to distinguish between economic and noneconomic activities, and (3) characterizing areas of regulation as traditionally committed to state supervision. By adopting a highly pliable approach in determining what activities are important for constitutional analysis, the Rehnquist Court is able to manipulate outcomes by selecting a unidimensional and limited perspective on what activities are of constitutional relevance. The result is a jurisprudence that appears formal and somewhat mechanical, but in fact is premised on the Courts' judgment-laden and nondeferential selection of a single, relevant activity that often has insufficient links to commerce.

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320 *See supra* Part III.A.

321 *See supra* note 215.

322 *See supra* Part II.B, D.

323 *See* CUSHMAN, *supra* note 70, at 169–70 (describing some of the Justices' dissatisfaction with the Court's pre-1937 categorical approach to Commerce Clause analysis); *id.* at 214–22 (describing Justice Jackson's rejection of the pre-1937 Court's categorical Commerce Clause analysis). In the course of considering *Wickard v. Filburn*, Justice Jackson wrote a memorandum to his clerk in which he emphasized the need for deference to congressional judgments: "'We have all but reached an era in the interpretation of the commerce clause of candid recognition that we have no legal judgment upon economic effects which we can oppose to the policy judgment made by Congress in legislation.'" *Id.* at 217 (quoting Memorandum from Justice Jackson, to Mr. Costelloe (July 10, 1942)).

This adoption of a unidimensional perspective, which empowers the Court to make key judgments that controvert the political branches' choices (often producing an antiregulatory effect), forms a notable strain in the Rehnquist Court's recent jurisprudence. As this Part demonstrates, by employing a limiting perspective, usually in the form of special solicitude for the putative targets of regulation, the Court derails regulatory goals in a variety of areas. This Part begins by highlighting briefly the antiregulatory implications of the Court's recent Commerce Clause innovations. It then turns to several other areas of public law in which the Court has deployed an analogous approach and applied uncertain tests that purportedly lead to determinate answers. In these domains, as well as in the Commerce Clause area, the Court's narrow perspective has led to decisions with clear antiregulatory implications.

A. Commerce Clause

In three recent Commerce Clause cases—*Lopez*, *Morrison*, and *SWANCC*—the Rehnquist Court has selected a single perspective from which to assess the adequacy of congressional power. In *Lopez* and *Morrison*, the Court focused on the target activity prohibited by government regulation.[324] In both cases, the Court reduced the focus of the statute at issue to a single prohibited activity. The Court in *Lopez* characterized the Gun-Free School Zones Act as relating to "the possession of a gun in a school zone."[325] In *Morrison*, the Court referred to the law as focused on "[g]ender-motivated crimes of violence," which the Court characterized as "not, in any sense of the phrase, economic activity."[326] The Court found insufficient, indeed virtually irrelevant to its Commerce Clause analysis, the extensive legislative materials revealing broad congressional concerns over both the substantial economic harms associated with such violence and the benefits of federal regulatory intervention.[327] In contrast, in *SWANCC*, the Court's analysis shifted gears and logic. The Court acknowledged the importance of defining the activity at issue under the relevant statutory provision.[328] However, the Court then downplayed both the apparently commercial nature of operating a municipal landfill and the broad commercial repercussions of protecting migratory birds using the threatened wetlands.[329] Instead, the Court emphasized the environmental protection aspects of the Clean Water Act and found the

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324 *See supra* Part II.D.

325 *See* 514 U.S. 549, 560 (1995).

326 *See* 529 U.S. 598, 613 (2000).

327 *See id.* at 614–17.

328 *See* Solid Waste Agency v. United States Army Corps of Eng'rs, 531 U.S. 159, 166–168 (2001).

329 *See id.* at 172–73.

assertion of federal power tenuous.[330] In all three cases, the Court buttressed its analysis by generalizing each law's area of regulation and characterizing the challenged provisions as implicating areas of the "states' traditional and primary power,"[331] infringing on domains in which the states "'possess primary authority,'"[332] or constituting a clear federal usurpation of "the police power, which the Founders denied the National Government and reposed in the States."[333]

These characterizations of the relevant activities and areas of regulation were far from inevitable. In *Lopez*, the Court could have focused on the business aspects of education, the business of guns or even illegal guns, defendant Lopez's plan to sell a gun in the school,[334] or the many ripple effects of school quality and safety on economic vitality. In *Morrison*, the Court similarly could have given weight to the substantial documentation by the legislature of the massive commercial effects and economic harms associated with gender-motivated violence and could have characterized the case as following a substantial line of post–Civil War federal legislation intended to protect civil rights, rather than seeing the case as simply about "the police power."[335]

SWANCC remains the most difficult of these cases to explain or justify. Following the methodology of *Lopez* and *Morrison*, one might have expected the Court to focus on the activity constrained or prohibited. The target then would have been the activity of harming wetlands: either filling in general or the multiple municipality landfilling plan at issue in the litigation. Unless the Court chose to use *SWANCC* to revisit its "aggregation" approach to Commerce Clause analysis, the

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330 *See id.* at 166–67, 172–74.

331 *Id.* at 174.

332 *See* United States v. Lopez, 514 U.S. 549, 561 n.3 (1995) (quoting Brecht v. Abrahamson, 507 U.S. 619, 635 (1993)).

333 *See* United States v. Morrison, 529 U.S. 598, 617–18 (2000).

334 *See* Funk, *supra* note 147, at 10768 (noting that the *Lopez* Court "was uninterested in the fact that Lopez had actually brought the gun to the school to deliver it to a person who had purchased it" and that "the fact that Lopez was engaged in economic activity and commerce when he violated the Gun-Free School Zones Act had no bearing on the case").

335 *See Morrison*, 529 U.S. at 614–18. It would perhaps have been better if the Court had not even insisted on some compiled documentation, but had instead made a simple nod to the existence of similar information outside any kind of legislatively collected set of materials. For a discussion of flaws in the judicially imposed requirement of legislative documentation, see Buzbee & Schapiro, *supra* note 1, at 119–35. The Court's attempt to defend its method relied on the slippery slope argument that consideration of such effects would afford plenary power to Congress. *See Morrison*, 529 U.S. at 615–16; *see also Lopez*, 514 U.S. at 564 ("[I]f we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate."). Contrary to this assertion, rejection of a unidimensional approach need not constitute an abdication of judicial review. *See infra* Part V; *see also* Shane, *supra* note 7, at 222–24 (criticizing the Court's invocation of slippery slope arguments in *Lopez* and *Morrison*).

case should have been easy.[336] *SWANCC* is also troubling because of the Court's insistence on interpreting the case and the Clean Water Act as involving land use regulation, a function it characterized as "'traditionally performed by local governments,'"[337] rather than as an example of federal environmental leadership in pollution control, protection of biodiversity, or wildlife regulation.[338]

In each of these cases, the result was to defeat the federal legislature's or agency's decision to provide a federal remedy. The breadth of public concerns generating these challenged laws—violence around schools, violence against women, and aggregate threats to wetlands and wetland-dependent wildlife—all were ignored by the Court. The Court manipulated the perspective of its Commerce Clause analyses to acknowledge as constitutionally relevant, not the full scope of these broader public concerns, but rather a narrower perspective. By generalizing each statute's goal, applying the narrow and unidimensional perspective to the relevant activity, casting each law as impinging on an area of traditional state primacy and choosing to focus on an activity that made the assertion of federal power most tenuous, the Court made each case appear preordained. A modest recasting of each case and a broadened analytical perspective, however, could easily have led to contrary results, especially in *Morrison* and *SWANCC*.

The Rehnquist Court's return to earlier conceptions of Commerce Clause jurisprudence and its particular jurisprudential methodology fit within the strong, atavistic, antiregulatory streak evident in several other areas of the Court's jurisprudence. In these realms, the Court has similarly adopted largely indeterminate criteria that evoke a bygone era of reduced federal presence, a greater role for common law courts, and a minimization of the activist regulatory state.[339] In all of these areas, the Court's decisions have favored those who oppose regulation.[340] The Court has once again shown special solicitude for the "targets" of regulation, understood as the bearers of rights recog-

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336 For an exploration of the aggregation principle and the related conception of a "comprehensive scheme" principle in Commerce Clause jurisprudence, see, for example, Adrian Vermeule, *Centralization and the Commerce Clause*, 31 ENVTL. L. REP. 11334 (2001).

337 *See* 531 U.S. 159, 174 (2001) (quoting Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30, 44 (1994)).

338 *See id.* at 191 (Stevens, J., dissenting) (disputing the majority's assertion that the case involved an area of traditional state control, and asserting that "the [Clean Water Act] . . . is a paradigm of environmental regulation . . . [and] an accepted exercise of federal power"); *see also* Bradford C. Mank, *Protecting Intrastate Threatened Species: Does the Endangered Species Act Encroach on Traditional State Authority and Exceed the Outer Limits of the Commerce Clause?*, 36 GA. L. REV. 723, 773–80 (2002) (arguing that the legislation at issue in *SWANCC* can be viewed as regulating in a realm of concurrent state and federal control).

339 *See* Shane, *supra* note 7, at 233 (noting that the current jurisprudential attitude favors "those who reflexively oppose activist national government").

340 *See supra* Part II.D.

nized at common law.[341] The Rehnquist Court has shown no signs of viewing itself as a partner assisting the legislature and executive agencies in carrying out democratic choices.

For example, the Court's revived attention in federalism cases to whether an area of regulation is one traditionally dealt with by state governments similarly requires a highly discretionary analytical process resulting in a single answer. Seldom has the Court in recent years conceded an area of federal leadership or concurrent state and federal authority. Despite the Court's rejection in *Garcia v. San Antonio Metropolitan Transit Authority* of its short-lived jurisprudence requiring judicial determination of the question whether a law applied to a traditional state government function,[342] the Court has once again added a similar inquiry into its federalism decisions.[343] As discussed earlier in this subpart, and strenuously argued by Justice Stevens in dissent in *SWANCC*, judicial assertion that the Clean Water Act's wetlands provisions involved an area of traditional state primacy (land use, rather than pollution control, wildlife preservation, or environmental protection, all areas of arguable federal leadership or at most concurrent state and federal domain) influenced the Court's distorted reading of the underlying statute and the Court's own related precedents.[344] How the Court reaches its conclusion that a challenged law impinges on an area of claimed state primacy remains unclear, but the return to these pre-1937 analytical hurdles appears likely to drive the Court's future forays into statutory interpretation toward reducing the reach of federal regulation.[345]

B. Lack of Deference to Administrative Agencies

The increasing prominence of textualist jurisprudence in the Court's decisions is, as discussed earlier in this Article, usually justified with reference to legislative primacy and the untrustworthiness of judges.[346] In its more recent applications, however, the Court's textualist adherents have begun to use text-dependent interpretive modes in a manner leading to judicial rejection of administrative agency interpretations of law. The Court's interpretive framework for reviewing agency interpretations of statutory law, announced in the oft-cited *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,[347] for example, was initially viewed as a vehicle to promote judicial deference to

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341 *See supra* Part II.B, D.

342 *See supra* note 265.

343 *See supra* notes 331–33 and accompanying text.

344 *See supra* note 338 and accompanying text.

345 *See* Eskridge & Frickey, *supra* note 265, at 640–46.

346 *See, e.g., supra* Part III.A.3.

347 467 U.S. 837, 842–43 (1984).

agency interpretations of law.[348] Under the usually applicable deferential "step two" mode of interpretation, reasonable agency interpretations of a statutory gap or ambiguity were entitled to judicial deference.[349] Recently, however, Justice Scalia, the Court's most vocal textualist, has conceded that textualism leads him to afford less deference to administrative agencies: "One who finds *more* often (as I do) that the meaning of a statute is apparent from its text and from its relationship with other laws, thereby finds *less* often that the triggering requirement for *Chevron* deference exists."[350] This expanded realm of undeferential step one *Chevron* analysis means that, in the words of Justice Scalia, it is "relatively rare that *Chevron* will require me to accept an interpretation which, though reasonable, I would not personally adopt."[351] The core assumption of step one is that the Court can glean a precise meaning in statutory language and structure and, therefore, that the agency interpretation must fall before a contrary judicial view. Like its identification of a single relevant activity for Commerce Clause purposes, the Court's fixation in *Chevron* analysis on the concept of a unitary statutory meaning relocates authority to the judiciary. The Court plucks one favored construction from the many possible interpretations, denying the multiplicity of statutory meaning, and applies an univocal approach that makes the judicial interpretation final.[352]

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348 *See, e.g.*, Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 455 (1989) (describing *Chevron* as "an opinion which endorsed deference in emphatic terms"); Michael Herz, *Deference Running Riot: Separating Interpretation and Lawmaking Under* Chevron, 6 ADMIN. L.J. AM. U. 187, 188–89 (1992) ("*Chevron* . . . accepts the legitimacy of broad congressional delegation, and warns the courts that the delegation is not to them but to the democratically accountable agencies."); Thomas W. Merrill, *Textualism and the Future of the* Chevron *Doctrine*, 72 WASH. U. L.Q. 351, 353 (1994).

349 *Chevron*, 467 U.S. at 842–43.

350 Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 521. Thomas Merrill notes that, in Scalia's view, the combination of *Chevron* and textualist interpretive methods that shun intentionalism leads to reduced agency interpretive freedom. Merrill, *supra* note 348, at 354.

351 Scalia, *supra* note 350, at 521.

352 *Cf.* Richard J. Lazarus & Claudia M. Newman, City of Chi. v. Envtl. Defense Fund: *Searching for Plain Meaning in Unambiguous Ambiguity*, 4 N.Y.U. ENVTL. L.J. 1, 15–19 (1995) (describing ambiguities in a statute with respect to which the authors had successfully advanced a plain meaning argument in litigation). The Court in recent statutory interpretation cases has similarly avoided concessions of statutory ambiguity and concomitant deference to agencies, choosing instead to interpret disputed provisions by drawing inferences from other statutes' linguistic choices. *See, e.g.*, FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000) (construing the Food, Drug, and Cosmetic Act as not authorizing FDA regulation of tobacco, based substantially on analysis of subsequent tobacco-regulating statutes); W. Va. Univ. Hosps. v. Casey, 499 U.S. 83, 88–89 & n.4 (1991) (construing a civil rights law regarding attorney's fee shifting as not including a right to expert costs based primarily on a comparison of various statutes' handling of similar issues); *see also* Buzbee, *One-Congress Fiction*, *supra* note 1, at 179–203 (analyzing numerous recent cases in which the Court has interpreted statutes by such interstatutory comparisons of usage). By

C. Standing and the Review of Agency Actions

Recent Rehnquist Court changes in constitutional standing doctrine and preclusion of judicial review under the Administrative Procedure Act have facilitated "slippage" in federal legislative regimes, as those supporting enforcement and implementation of the law find themselves disfavored in seeking access to the courts.[353] Most notably in the standing arena, four of the five Justices recasting Commerce Clause doctrine have developed jurisprudence that explicitly provides easy court access to putative "targets" of regulation, but requires "much more" from "beneficiaries" of regulation, even if Congress has provided an explicit cause of action under a citizen suit provision.[354] In this area, as well, the favored "targets" are holders of interests recognized at common law.[355]

The shift in this area has not been as stark as in the realm of Commerce Clause jurisprudence. For instance, Justice Kennedy's *Lujan* concurrence, joined by Justice Souter, rejects the common law emphasis implicit in the Court's standing doctrine.[356] In addition, a few

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engaging in the "one-Congress fiction,"—that Congress drafts in an omniscient manner and with awareness of other statutes' language choices—the Court engages in creative interpretation to find a single acceptable meaning. This interpretive approach often denies agencies discretion to resolve the language question in one of numerous potential ways. *See id.*; *see also* Merrill, *supra* note 348, at 373 ("Having fewer tools to work with, the textualist—like the painter working with a small palett[e]—necessarily has to become more imaginative in resolving questions of statutory interpretation.").

353 *See* Daniel A. Farber, *Taking Slippage Seriously: Noncompliance and Creative Compliance in Environmental Law*, 23 HARV. ENVTL. L. REV. 297, 311–13 (1999).

354 For the most significant exegesis of this view, see *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), in which the Court stated that, in cases in which an alleged injury results from "allegedly unlawful regulation (or lack of regulation) of *someone else*, much more is needed," *id.* at 562. The *Lujan* Court explained that the more rigorous standing criteria resulted from lower courts' difficulty in tracing and redressing injuries that stem from "'unfettered choices made by independent actors not before the courts . . . .'" *Id.* (quoting ASARCO Inc. v. Kadish, 490 U.S. 605, 615 (1989)). For critiques of the *Lujan* decision, see, for example, Gene R. Nichol, Jr., *Justice Scalia, Standing, and Public Law Litigation*, 42 DUKE L.J. 1141 (1993); Richard J. Pierce, Jr., Lujan v. Defenders of Wildlife*: Standing as a Judicially Imposed Limit on Legislative Power*, 42 DUKE L.J. 1170 (1993); Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 476, 484–85 (1996); Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163 (1992). For a pre-*Lujan* analysis of metaphors used in standing analysis and the questionable historical roots of current standing frameworks, see, for example, Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371 (1988). Probably the most insightful and influential exploration of standing doctrine preceded *Lujan* by several years and anticipated many of the critiques of *Lujan* cited above. *See* William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221 (1988).

355 *See* Sunstein, *supra* note 354, at 186–92.

356 *See Lujan*, 504 U.S. at 580 (Kennedy, J., concurring) ("In my view, Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before . . . ." (citing Warth v. Seldin, 422 U.S. 490, 500 (1975)).

recent cases have moved away from the common law emphasis evident in *Lujan* and adopted a standing framework far more attentive to each statute's structure, goals and incentives.[357] Nevertheless, the principle announced in *Lujan*, which requires "much more" from regulatory beneficiaries seeking to compel courts to ensure that the executive branch complies with the law, remains controlling.[358] The uneven standing test not only reduces the enforceability of regulatory schemes in the courts, but also has an impact on the prior administrative process. Following the courts' lead, administrative agencies afford reduced attention to the arguments of regulatory beneficiaries and heightened concern for regulatory targets who will later have easy court access.[359] As noted by Cass Sunstein, the embrace of common law baselines and emphasis on common law conceptions of injury are "anachronistic revivals of pre-New Deal understandings of the legal system."[360] The rise of the New Deal regulatory state "rendered the distinction between regulatory objects and regulatory beneficiaries a conceptual anachronism, a relic of the *Lochner* period."[361]

Administrative Procedure Act doctrine under the "committed to agency discretion" prong of judicial-review preclusion has likewise been transformed in a manner disfavoring regulatory beneficiaries and facilitating agency drift from legislative goals. The Court has shown deference to agency decisions not to regulate. Although this prong of review preclusion started as a narrow doctrine focused on enabling act structure and language that leaves "'no law to apply,'"[362] it transmogrified into a body of doctrine focused on whole categories of agency action that involve agency choices analogous to prosecutorial discretion. Starting with *Heckler v. Chaney*'s creation of presumptive nonreviewability of agency nonenforcement decisions,[363] the Court has expanded this "functional approach" to hold unreviewable denials of petitions to reconsider, dismissals of security agency employees, and budget allocation decisions that terminate existing programs.[364] The Court has broadened the categories of unreview-

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357 *See* Buzbee, *Standing*, *supra* note 1, at 262–71.

358 *See supra* note 354.

359 *See* Buzbee, *supra* note 19, at 768–73 (discussing how uneven standing criteria will change underlying regulatory dynamics).

360 *See* Sunstein, *Constitutionalism*, *supra* note 18, at 478 (discussing "doctrines that distinguish between regulatory beneficiaries and regulated industries" in the context of "hard look" judicial review of administrative action).

361 Sunstein, *supra* note 354, at 188.

362 *See* Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 410 (1971) (quoting S. REP. No. 79-752, at 26 (1945)). For a lucid exploration of the development of this doctrine, see generally Ronald M. Levin, *Understanding Unreviewability in Administrative Law*, 74 MINN. L. REV. 689 (1990).

363 *See* 470 U.S. 821, 831–35, 837–38 (1985).

364 *See* Lincoln v. Vigil, 508 U.S. 182, 184 (1993); Levin, *supra* note 362, at 691–92.

able agency actions in the face of language in the APA calling for judicial review.[365]

As argued by Justice Marshall in his concurrence in the judgment in *Heckler v. Chaney* and further developed by Professor Sunstein, the Court's assumption that agency failures to act are of lesser concern fails to consider increased risks posed for intended beneficiaries of regulation: the Court appears to ignore "the reality that governmental refusal to act could have just as devastating an effect upon life, liberty, and the pursuit of happiness as coercive governmental action."[366] The Court's solicitude for avoiding the placement of regulatory burdens on the targets of regulation and failure to consider the needs of beneficiaries once again reflects a pre-1937 conception of law and regulation. Common law interests and the absence of regulatory constraints are the presumptive baseline. Deviations from that baseline are suspect. The result in the area of "committed to agency discretion" review preclusion is, once again, that those seeking to avoid or challenge imposition of regulatory constraints can seek to challenge agency actions, but citizens concerned about agency failures to act are presumptively unable to gain a judicial audience. "Slippage" or "drift" from legislative goals goes unchecked in the absence of specific violations of statutory mandates.[367]

Although arising in the context of a standing dispute, the Court's refusal to recognize standing or a ripe controversy in *Lujan v. National Wildlife Federation*[368] reflects a similar disinclination of the Rehnquist Court to deal with regulatory interventions gone awry. In this earlier *Lujan* case, the plaintiffs alleged broad programmatic illegality,[369] but the very breadth of their allegations weakened their standing argument. The Court called for plaintiffs to seek recourse in the political venues: "[Plaintiffs] cannot seek *wholesale* improvement of this program by court decree, rather than in the offices of the Department or the halls of Congress, where programmatic improvements are normally made."[370] Broadly alleged illegality and inaction thus can be

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365 *See* Levin, *supra* note 362, at 739–40.

366 *See Heckler*, 470 U.S. at 851 (Marshall, J., concurring); *see also* Cass R. Sunstein, *Reviewing Agency Inaction After* Heckler v. Chaney, 52 U. CHI. L. REV. 653, 664 (1985) (discussing Justice Marshall's concurrence in *Heckler*).

367 *See* Farber, *supra* note 353, at 311–19; *see generally* Kenneth A. Shepsle, *Bureaucratic Drift, Coalitional Drift, and Time Consistency: A Comment on Macey*, 8 J.L. ECON. & ORG. 111 (1992) (developing concepuons of political "drift").

368 497 U.S. 871 (1990).

369 *See id.* at 875, 879.

370 *Id.* at 891. In Justice Scalia's earlier scholarship, he argued explicitly that standing doctrine should be utilized to allow past political choices lacking current support to fall into desuetude. *See* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 896–97 (1983).

unreviewable, while those subject to regulation invariably are provided recourse in the courts.

D. Common Law and the Commerce Clause

The Court's recent Commerce Clause innovations thus share attributes with several rapidly changing bodies of public law. In each of these areas, the Court has constructed approaches vesting it with substantial discretion, embraced analytical frameworks that result in single judicially chosen outcomes, and shown little concern for ensuring that legislatively chosen goals are fulfilled. The efforts of regulatory beneficiaries to enforce the law encounter doctrines disfavoring their pleas.

Changes in these other interpretive settings help to shed light on the Court's Commerce Clause jurisprudence. With regard to the Commerce Clause, the Court's common law orientation appears to drive it to define the relevant issue at the narrowest, most individualistic level. The image implicit in the Court's analysis is a state of nature in which the individual exercises supposedly inherent rights and is free, except as restrained by the intervening government. In asking the Commerce Clause question, the Court frames the inquiry in terms of the man[371] versus the government: the man is carrying a gun, the man is acting violently, the man is working on his land. From this narrow, atomistic perspective, none of the activities appears "commercial." But, of course, the chosen approach substantially loads the question. It is through interaction with others that people generally engage in commercial activity or generate sufficient collective concern to serve as the impetus for political intervention. To a large degree, both commercial and political activity are distinguished by their communal or collective character.[372] In each instance, one could substitute a communal focus, in which case the activities assume a much

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371 The choice of the gendered term is purposeful. The defendants claiming immunity from federal regulation in both *Lopez* and *Morrison* were, in fact, men. *See* United States v. Morrison, 529 U.S. 598, 602–04 (2000); United States v. Lopez, 514 U.S. 551, 561–62 (1995). Further, in *Morrison*, the Court struck down a statute specifically designed to provide equal rights to women. *See Morrison*, 529 U.S. at 1755, 1759. For a discussion of the potential significance of this aspect of *Morrison*, see Sally F. Goldfarb, *The Supreme Court, the Violence Against Women Act, and the Use and Abuse of Federalism*, 71 FORDHAM L. REV. 57, 135 (2002) (discussing competing characterizations of the Violence Against Women Act as relating to criminal law, family law, or civil rights law); Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 1035–44 (2002) ("When courts invalidate a federal law . . . intended to secure equal citizenship for women on the ground that the federal law interferes with state control over domestic relations law, courts may well be perpetuating old common-law understandings of marriage as the basis of citizenship in our constitutional order.").

372 *See, e.g.*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 456 (1961) (defining "commerce" as, inter alia, "a social intercourse: dealings between individuals or groups in society: interchange of ideas, opinions, or sentiments").

more commercial cast. Lopez was not just carrying a gun, but was intending to sell the gun and threatening other students' ability to obtain an education. Morrison was not just engaging in violent acts, but, by sexually assaulting Christy Brzonkala, was interfering with her ability to function in society. *SWANCC* again most clearly demonstrates the fictive quality of the Court's approach. The Solid Waste Agency was not a person at all, but a collection of municipal corporations that undertook to build a commercial disposal site, the construction of which had many effects on the regional and national economy.[373]

The statutes in *Lopez*, *Morrison*, and *SWANCC* reflected many motivations and have impacts on many targets and beneficiaries. The Court has replaced this diversity with a reductionist depiction of the activity, portraying only an individual being constrained by the state. From this unidimensional view, the statutes' connections to commerce appeared weak. The Court's narrow, individualistic focus obliterates the social interconnection that constitutes economic activity and creates the impetus for federal political intervention in the first place. To the extent that the Court acknowledges its choice of a single, privileged perspective, it defends that choice by reference to the slippery slope. Unless its approach is adopted, the Court asserts, no activity would lie beyond national regulation.[374] Under this view, if the Court were to move beyond its state-of-nature framework, economic links appear everywhere and congressional power would become plenary. Even if one accepts this slippery slope mode of logic, however, the next Part of this Article demonstrates that the argument fails. A court can abandon unidimensional, common law assumptions and continue to exercise judicial review.

V
THE LEGISLATIVIST ANSWER

The regulatory prism speaks primarily to the kinds of connections that should constitute a sufficient nexus to commerce.[375] It does not implicitly dictate a particular level of judicial scrutiny. This Article argues that a singular focus on targets of regulation is erroneous. As the Court recognized between 1937 and 1995, the commercial effects of legislation, the commercial implications of an underlying problem, as well as the commercial nature of the regulatory target, all could

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373 *See supra* notes 148–63.

374 *See Morrison*, 529 U.S. at 615–16; *Lopez*, 514 U.S. at 564 ("[I]f we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate.").

375 *See supra* Part I.

legitimate the exercise of national legislative power.[376] The multidimensional approach of this period reflected a sound judicial modesty, which acknowledged that courts are poorly situated to do more than recognize the usual multiplicity of ways in which laws address a social need or seek to effect change, often with a commerce nexus.

If courts are ill suited to discern a single, relevant activity linked to commerce, much as they are ill suited to discern a single overriding or public-regarding statutory purpose,[377] the logical question that follows is whether one can derive a principled mode of Commerce Clause judicial review, or whether Congress should in effect be the judge of the validity of its enactments. Many scholars have supported the idea of using political, rather than judicial, safeguards to enforce limits on congressional authority grounded in federalism concerns.[378] The current Court, however, has decisively rejected this position. Such a judicial abdication would require an analytical reversal of *Lopez*, *Morrison*, and *SWANCC*. The Rehnquist Court's federalism jurisprudence contemplates some judicial reviewing role in assessing the sufficiency of legislation under the Commerce Clause. This Part, therefore, develops an approach that retains a role for judicial review, but which better accommodates the multidimensional aspects of legislation.

This Part stands as a refutation of the Court's slippery slope arguments. In justifying its restrictive approach to interpreting the Commerce Clause, the Court has asserted the need to find some limits on federal authority. The Court has rejected a variety of arguments about the commercial nexus of challenged enactments by asserting that such arguments, if accepted, would lead inevitably to a conception of plenary federal power.[379] In other words, a theory that validates any congressional enactment, the Court believes, is inherently flawed. Nor has the Court been willing to accept the political safeguards of federalism as adequate protection of the doctrine of enumerated powers. The Court has insisted that federalism must be judicially enforceable, not simply a matter of legislative grace.[380] As developed in this Part, we reject the false dichotomy between adop-

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376 *See supra* Part II.C.

377 *See supra* Part III.A.

378 *See, e.g.*, JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS, 175–84 (1980); Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215 (2000); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).

379 *See supra* note 374 and accompanying text.

380 *See, e.g.*, United States v. Morrison, 529 U.S. 598, 614 (2000) (citing United States v. Lopez, 514 U.S. 551, 557 n.2 (1995)).

tion of a unidimensional perspective and abandonment of judicial review.

Accepting the modality of judicial review that we discuss would not require an explicit rejection of the Court's stated approach. The Court has yet to explain what factors courts should examine for purposes of Commerce Clause analysis. Nor has the Court yet elaborated a method for determining the relevant activity in its Commerce Clause analysis. Given the absence of any transparent Court exposition of its own methodology, one must examine the Court's mode of decision for any guidance. *SWANCC* suggests methodological vacillation over whether the Court should examine the target's activities, the beneficiaries' links to commerce, the broader legislative motivations, or the law's general category of regulation.[381] Although the Court has implicitly adopted a unidimensional perspective, it has not explicitly rejected a broader framework. In sum, doctrinal space exists for an approach to judicial review that rejects unidimensionality.

This Article suggests an approach that we denominate the legislativist answer to this central Commerce Clause question. The legislativist answer is that close but deferential scrutiny of Congress's handiwork—the text of a challenged statute—should guide Commerce Clause "activity" analysis. The Supreme Court's recent cases adopting the unidimensional perspective (and lower courts applying these recent precedents) arbitrarily focus on only one potentially relevant "activity" implicated by the challenged legislation.[382] The focus has typically been on what this Article's regulatory prism discussion refers to as the regulatory target, generally considered as the common law rights holder subject to intrusive government intervention. At other times, the Court has focused on beneficiaries, and seldom, if at all, has the Court examined the broader commercial effects of federal regulatory intervention.

To anchor the courts' analysis, this Article proposes a simple touchstone for Commerce Clause analysis: a statute's text should guide the courts. This proposal constrains the courts by limiting their choice of relevant "activities." It also forces the courts to acknowledge multiple, constitutionally relevant activities and the complex goals, compromises, and purposes that pervade legislation.[383] This legislativist solution draws support from other areas of law, in particular the law of standing, in which a constitutional test—the existence of a

381 *See supra* notes 148–63 and accompanying text.

382 *See, e.g., supra* Part II.D–F.

383 *Cf. supra* Part III.A.1 (discussing the problems of finding a single purpose behind a law).

"case" or "controversy" under Article III—requires careful attention to the relevant statutory scheme.[384]

A. Applying the Legislativist Approach

In cases in which a litigant challenges federal legislation by asserting that the law lacks a sufficient commerce link, the courts should examine the statutory text in the following manner. Findings and purpose provisions that are found early in most statutes provide a fully presented and enacted view of what the legislature and President deemed to be the underlying reasons for the legislation. If these provisions identify harms, benefits, or activities that motivate the enacted legislation, those identified concerns are undoubtedly "activities" that should be considered as potentially sufficient to justify legislation. This approach does not mean that findings or purpose provisions are required. Findings or purpose provisions can, however, serve to alert courts to the activities and concerns that motivated the legislature.[385]

Similarly, if laws explicitly identify classes of activities, people, or entities that are the object of legislative concern (be it legislative condemnation or solicitude), then courts evaluating constitutional sufficiency should add these activities, people, or entities as among the potential justifying bases for federal action. Finally, operative provisions seldom contain explanations of their purpose, but by their functioning implicitly identify both the targets and beneficiaries of behavior constrained by the federal law. These implicit beneficiaries, targets, and effects of regulation should also be added to the list of potential justifications for the challenged legislation. If, individually or in the aggregate, there exists a tenable commerce link, and if Congress has identified that link, the reviewing court's constitutional analysis should be complete.

This approach means that the courts would be exercising a level of scrutiny somewhat more rigorous than a fully deferential, rational basis review. Courts would not supply their own hypothetical commerce links if Congress does not identify somewhere in the enacted legislation a relevant goal, person, or entity as a target or beneficiary, or somehow reveal the underlying problem or effect motivating the legislation. Courts thus would be limited in their ability selectively to

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384 *See infra* Part V.B.

385 For discussion of the role of findings in constitutional adjudication, see Philip P. Frickey, *The Fool on the Hill: Congressional Findings, Constitutional Adjudication, and* United States v. Lopez, 46 CASE W. RES. L. REV. 695 (1996); Barry Friedman, *Legislative Findings and Judicial Signals: A Positive Political Reading of* United States v. Lopez, 46 CASE W. RES. L. REV. 757 (1996); Harold J. Krent, *Turning Congress into an Agency: The Propriety of Requiring Legislative Findings*, 46 CASE W. RES. L. REV. 731 (1996); Saul M. Pilchen, *Politics v. The Cloister: Deciding When the Supreme Court Should Defer to Congressional Factfinding Under the Post-Civil War Amendments*, 59 NOTRE DAME L. REV. 337 (1984).

ignore activities implicated by the legislation; to paraphrase the familiar refrain about abuse of legislative history, courts would no longer be able to pick out their statutory friends from the crowd.[386] Courts would also, however, be constrained in their ability to manufacture a Commerce Clause rationale if Congress has failed to make its motivations apparent.

The result of the legislativist approach is to retain a limited judicial role in checking federal legislation, but to render judicial review deferential to the legislature's enacted laws. The onus would be on Congress to clarify the basis of its authority. However, if challenged legislation were to articulate or reveal a commercial nexus, the Court would not second guess Congress's determination of commercial motives, targets, benefits, or effects, unless that congressional determination did not survive rational basis review. This legislativist approach recognizes the Constitution's grant of Commerce Clause authority to Congress and Congress's duty to discharge its constitutional obligations faithfully. Congress, as well as the Court, is responsible for vindicating constitutional values.

Several commentators have endorsed the notion that the Court should focus on the congressional deliberative process or statements of commercial nexus, rather than independently scrutinize legislative connections to commerce.[387] In his dissent in *Morrison*, Justice Breyer suggested review of the legislative process as a preferable alternative to the Court's scrutiny of the commercial character of the regulated activity.[388] The legislativist approach this Article outlines accords with these theories,[389] but offers one attribute rendering it arguably more

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386 *See* Conroy v. Aniskoff, 507 U.S. 511, 519 (1993) (Scalia, J., concurring) ("Judge Harold Leventhal used to describe the use of legislative history as the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one's friends.").

387 *See, e.g.*, Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 TEX. L. REV. 795, 799–800 (1996) (arguing for review focused on legislative deliberative process); Vicki C. Jackson, *Federalism and the Uses and Limits of Law:* Printz *and Principle?*, 111 HARV. L. REV. 2180, 2240–41 (1998); *see also* Engdahl, *supra* note 65, at 782 ("[T]he Constitution entitles the people to have their electorally answerable *political* organs *actually and openly* inquire, debate, compromise, and resolve whether and how far it is necessary to reach matters otherwise beyond the national government's scope, *in order to* effectuate enumerated federal powers."); Lessig, *supra* note 9, at 207–08 (suggesting the possibility of a clear statement rule as an alternative to the Court's approach in *Lopez*); Ernest A. Young, *Two Cheers for Process Federalism*, 46 VILL. L. REV. 1349, 1364 (2001) ("Process federalism's central insight is that the federal-state balance is affected not simply by *what* federal law is made, but by *how* that law is made.").

388 *See* United States v. Morrison, 529 U.S. 598, 663 (2000) (Breyer, J., dissenting).

389 Stephen Gardbaum and Vicki Jackson rest their theories in part on interpretations of the Necessary and Proper Clause, U.S. CONST. art. I, § 8, cl. 18. *See* Gardbaum, *supra* note 387, at 807–19; Jackson, *supra* note 387, at 2235–45. That clause does lend textual support to the more expansive interpretations of congressional power in the post-New Deal period. Moreover, the language of the post-New Deal cases suggests that they drew on conceptions of congressional power previously developed in the context of the Necessary

workable than Justice Breyer's legislative process review. Delving into materials that purport to reveal the legislative process will reflect only portions of the inputs into the legislative process and, as in the Court's recent unidimensional approach cases, will give courts broad latitude to choose what to examine or find sufficient.[390] A more text-based approach calls for a far narrower analysis and is confined to the scope of the statutory provisions actually enacted.

Scholars bave raised two important sets of objections to modes of judicial review that impose heightened drafting or process burdens on Congress. The criticisms can generally be characterized as complaints about too much or too little judicial oversight. First, some scholars argue that forcing Congress to specify statutory purposes or motives represents an unjustifiable judicial intrusion into the legislative process.[391] Indeed, some who argue that Congress should be required to articulate the constitutional basis of legislation tend to view such a proposal as only a second-best solution, preferable to rigorous substantive review, but less desirable than a fully deferential rational basis test.[392]

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and Proper Clause. *See* Gardbaum, *supra* note 387, at 807–10. For the past fifty years, though, courts have not emphasized the Necessary and Proper Clause in vindicating exercises of congressional authority. *See id.* at 810. The legislativist framework we advance does not require reference to the Necessary and Proper Clause. The approach recommended by this Article relies on broader structural and institutional principles regarding the allocation of governmental decision-making authority. It is not clear that a general theory of the Necessary and Proper Clause will yield more determinate standards for deciding cases such as *Lopez*, *Morrison*, or *SWANCC*. Further, the source of the standard does not appear critical. The main weapon deployed by the Court in its decisions construing the Commerce Clause narrowly is not the text of the Clause, but instead the slippery slope argument that there must exist some limits on congressional power. *See supra* note 374 and accompanying text. Whatever the force of an argument based on a general conception of enumerated powers, the Necessary and Proper Clause adds little by way of refutation. If it cannot be the case (because of some larger structural principle) that the Commerce Clause gives Congress plenary power, as the Court has stated, then it cannot be the case that the Commerce Clause and the Necessary and Proper Clause combined give Congress plenary power.

390 *See* Buzbee & Schapiro, *supra* note 1, at 146–48 (describing the scope of judicial discretion and potential for judicial abuse available in a process that permits courts to select the materials to be considered in legislative record review).

391 *See, e.g.*, A. Christopher Bryant & Timothy J. Simeone, *Remanding to Congress: The Supreme Court's New "On the Record" Constitutional Review of Federal Statutes*, 86 CORNELL L. REV. 328, 376–83 (2001) (discussing the constitutional illegitimacy of the Court requiring Congress to record the basis of its actions); Frank B. Cross, *Realism About Federalism*, 74 N.Y.U. L. REV. 1304, 1330–32 (1999) (discussing the perils of requiring Congress to establish the constitutional basis of its legislation).

392 In his dissent in *Morrison*, for example, Justice Breyer discussed the possibility of requiring evidence that Congress had considered its constitutional authority. *Morrison*, 529 U.S. at 663 (Breyer, J., dissenting). Ultimately, however, he reaffirmed his support for the traditional rational basis approach, which imposes no such obligation on Congress. *See id.* (Breyer, J., dissenting).

These critics point out legitimate practical and theoretical problems with judicial regulation of the legislative process. However, what this Article suggests is far less rigorous than a clear statement rule or a mandate for explicit legislative identification of purposes or findings.[393] Instead, the legislativist approach calls for courts to examine the multiple facets of a legislative text to discern what activities are relevant to the legislation and, accordingly, to a Commerce Clause challenge. Under this approach, Congress would not need to be explicit or unusually clear in legislative drafting; it would merely need to reveal in the statute's various provisions those activities implicated by the legislation. Analysis of legislative text to identify people, entities, motivations, and effects relevant under the challenged law should enable courts to identify a broader and more defensible array of constitutionally relevant commerce-linked activities.

Second, some argue that deference to congressional identification of a Commerce Clause nexus renders judicial review nugatory.[394] More persuasive, however, are the arguments of scholars who insist that, in view of the mechanics of the legislative process, a requirement of congressional articulation would place a meaningful limit on congressional authority.[395] The need to specify the commercial nexus would require Congress to consider the commercial implications of its legislation and perhaps to reject proposals with an insufficient connection to commerce. Rules that influence how Congress legislates inevitably influence *what* Congress legislates.

But, this objection continues, can Congress reach any activity as long as it claims to find a commercial connection? And, given the integrated nature of the national economy, cannot a plausible commercial nexus always be asserted? Is the scope of congressional power limited only by the scope of congressional imagination?[396]

Under our approach, the commercial connection that Congress articulates must be rational. The statute must have a rational connection to commerce when viewed from some perspective. Judicial review may not be stringent under this approach, but it exists. Does it remain possible that, if it really wants to regulate an activity, Congress always could fabricate a rational commercial connection? Perhaps,

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393 *See, e.g.*, Eskridge & Frickey, *supra* note 265, at 623–25.

394 *See, e.g.*, Friedman, *supra* note 385, at 763–64.

395 *See, e.g.*, Eskridge & Frickey, *supra* note 265, at 597 (discussing clear statement rules as a practical way for the Court to force congressional attention to constitutional values); Young, *supra* note 387, at 1387–90 (defending legislative process review as a meaningful form of judicial review, but also asserting a need for substantive review); *see also* Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1427 (2001) (stating that "clear statement" rules serve to ensure that "federal lawmaking procedures perform their intended function").

396 We thank Robert Pushaw for pressing this point upon us.

but that kind of objection seems misplaced. If the commercial nexus is rational, then the Constitution grants the authority to Congress. That result follows from the Constitution's basing congressional power on a concept such as commerce, the scope of which may evolve over time. Moreover, the objection rests on an underlying assumption of congressional bad faith. In the end, constitutional interpretation is dangerous business: it is not clear that the greater danger lies with the possibility of congressional rather than with judicial overreaching. Courts applying vague, manipulable standards based on the slippery slope argument that some limits are necessary present grave dangers of judicial overreaching.[397] Those perils seem at least as great as any presented by the legislativist framework we advance.

B. Precedents and Analytical Analogs for the Legislativist Answer

Although the post-New Deal Court did not explain its increasingly deferential Commerce Clause review in terms identical to this Article's proposed legislativist answer, the multiple ways in which the Court found that legislation passed muster are consistent with this proposed methodology. Moreover, the increasingly stringent review exercised by the Rehnquist Court has never included a methodological explanation that precludes consideration of the statutory complexity this Article describes in its regulatory prism discussion.[398] Indeed, in *SWANCC*, the Court was troubled by the commerce justifications for the Clean Water Act as applied to wetlands used by migratory birds, but it did not strike down the legislation on Commerce Clause grounds, and even noted a late litigation suggestion that the targets' harmful activities were appropriate subjects of Commerce Clause consideration.[399] Arguments from approximately fifty years of precedent support the legislativist answer. No Supreme Court decision has explicitly explained its methodology in a manner that precludes the approach suggested here.

This Article's proposal—that close but deferential textual analysis should guide a court's constitutional inquiry into the sufficiency of

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397 In debates over the revival of the delegation doctrine, critics of revival question the prudence of handing such a substantial and inherently political role to the courts in light of "the absence of judicially manageable and defensible criteria to distinguish permissible from impermissible delegations." Richard B. Stewart, *Beyond Delegation Doctrine*, 36 AM. U. L. REV. 323, 324 (1987); *see also* Richard J. Pierce, Jr., *The Role of Constitutional and Political Theory in Administrative Law*, 64 TEX. L. REV. 469, 521 (1985) (arguing that judges are incapable of distinguishing between "a legislative body's failure to resolve a policy dispute notwithstanding its best efforts to do so and a legislative refusal to make a policy decision that is motivated by lack of political will," and that they "inevitably would substitute their preferred resolutions of . . . policy disputes").

398 *See supra* Part I.

399 *See* Solid Waste Agency v. United States Army Corps of Eng'rs, 531 U.S. 159, 173 (2001).

links to commerce—has two analytical analogs, both drawn primarily from administrative law doctrine. The Court's recent standing opinions provide the most obvious analogy.[400] In 1992, the Court appeared to adopt a common law concept of "injury in fact" for statutory injuries made actionable by a citizen suit provision.[401] However, subsequent cases have made clear that Justice Kennedy's critical concurrence (joined by Justice Souter) in *Lujan v. Defenders of Wildlife* represented what is now a settled view of the Court.[402] Although injuries akin to those recognized at common law will suffice to establish standing, that key *Lujan* concurrence recognized that Congress retains authority to articulate "new rights of action that do not have clear analogs in our common-law tradition."[403] Supreme Court cases decided during the past few years have made clear that court analyses of injuries, causation, and redress, for purposes of constitutional standing, are all heavily determined by the universe of interests and incentives created by a statute.[404] This Article similarly calls for Commerce Clause analysis that is largely shaped and confined by the underlying statutory text.

Two related doctrines pertaining to access to judicial review now manifest a similar close judicial analysis of statutory findings, purpose, and operative provisions. Prudential "zone of interest" standing analysis for causes of action under the Administrative Procedure Act is explicitly rooted in the text of the relevant statute.[405] Much as this Article proposes in its legislativist answer to the Commerce Clause "activities" question, courts recognize citizen standing to challenge regulatory action regardless of whether the litigant is "protected or regulated" by the law.[406] Moreover, it does not matter if a person is seeking to expand or reduce the reach of the law. If the law protects a party or constrains the source of a harm, both are within the statutory "zone" unless subject to another preclusion argument.[407] Determining who is within this statutorily relevant zone requires analysis of a statute's provisions to determine the people, entities, and goals behind the statute.[408]

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400 *See supra* Part IV.C.

401 *See supra* note 354 and accompanying text.

402 *See* Buzbee, *Standing*, *supra* note 1, at 258–59, 266, 279.

403 Lujan v. Defenders of Wildlife, 504 U.S. 555, 579–80 (1992) (Kennedy, J., concurring).

404 For development of this analysis of standing doctrine, see Buzbee, *Standing*, *supra* note 1, at 258–59, 266, 279.

405 *See* Bennett v. Spear, 520 U.S. 154, 166 (1997).

406 *Id.* at 163–71.

407 *Id.* at 163–67.

408 *Id.* at 174–76.

The mode of analysis utilized in *Block v. Community Nutrition Institute*[409] provides further support for the textual analysis this Article suggests. In *Block*, the Court had to determine if consumers could sue in connection with a regulatory milk marketing and pricing decision where the statute granted suppliers and handlers an explicit regulatory role and review rights.[410] Based on its parsing of the underlying statute to determine who was meant to be able to sue, the Court concluded that consumers could not bring a challenge.[411] The Court found that an analysis of text and operative provisions made it "fairly discernible" from the statutory scheme that Congress did not intend to grant consumers recourse to the courts.[412]

This Article calls for a mode of judicial analysis of statutory language and operative provisions similar to that applied in *Bennett* and *Block*, but used here to discern the constitutionally relevant actors, actions, motivations, and effects for purposes of Commerce Clause analysis. Although this approach would undoubtedly still require the exercise of judicial judgment, attention to this approach's broader array of factors reduces the discretion wielded by courts that might otherwise select only a single activity for purposes of Commerce Clause analysis. Expanding the breadth of relevant provisions and activities that courts must consider would act to confine judicial exercises of discretion, thereby reducing opportunities for ends-oriented, manipulative judicial selection of the perspective for assessing legislation.

CONCLUSION

Commerce Clause review inevitably requires courts to choose a perspective, or perhaps multiple perspectives, in their examination of challenged legislation. Courts seek to discern through that examination some activity or activities that are sufficiently linked to commerce to justify the assertion of federal power. The Court's shift since 1995 to a unidimensional approach is a reductionist interpretive move, which privileges one perspective and one activity as constitutionally relevant. The more complex legislative process we explore in the suggested regulatory prism schematic illuminates how the Court's circumscribed search for a single relevant activity fails to acknowledge a predictably far more complex legislative reality. Furthermore, the judicial search for a single relevant activity in challenged legislation stands in substantial tension with critiques of purposive statutory interpretation, particularly the sound assertion that laws tend to have multiple purposes and to reflect political compromises. Whether in the

409 467 U.S. 340 (1984).
410 *See id.* at 341–42.
411 *See id.* at 345–48.
412 *See id.* at 348, 352.

context of constitutional analysis or statutory interpretation, laws typically reflect a multiplicity of goals and cannot be reduced to being "about" a particular purpose or activity. This Article's call for a more deferential mode of judicial review that incorporates a multiplicity of perspectives into Commerce Clause review does not lead to judicial abdication of the courts' constitutional role. Instead, the legislativist answer calls for judicial attention to the challenged text to discern what societal ills, goals, targets, beneficiaries, and activities are implicated by the challenged law. If any of these multiple perspectives, as gleaned through statutory analysis, reveals a sufficient commerce link, the court should reject the Commerce Clause challenge. Any other reductionist mode of review that ignores the more complex fabric of modern legislation fails to show adequate regard for the work of the legislative branch.